SUPREME COURT, U. S.

No. 73-1863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Court, U. S.
FILED
JUN 12 1974
MICHAEL RODAK, JR., CLERK

ZIM'S FOODLINER, INC., d/b/a ZIM'S IGA FOODLINER, and S & O, INC., d/b/a PAUL'S IGA FOODLINER,

Petitioners,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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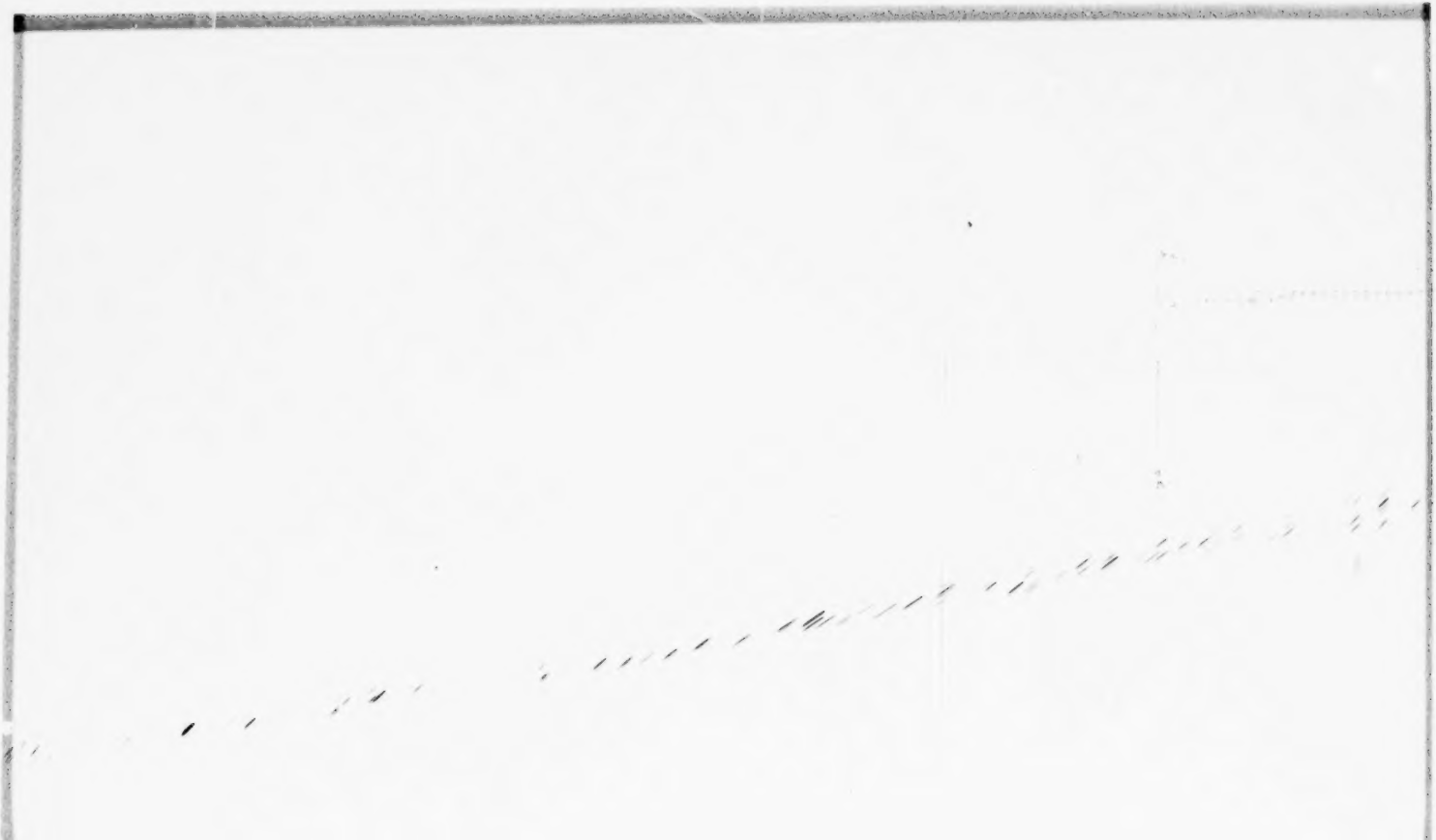

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Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the Decision and Order of the United States Court of Appeals for the Seventh Circuit in its Cause No. 73-1199, decided April 4, 1974.

OPINIONS BELOW

The Decision and Order of the Court of Appeals in this cause is set forth in the Appendix to this petition, commencing at page A-32, *infra*. The dissent of Circuit Judge Pell commences at page A-55. The decision has not yet been officially reported.

The Decision and Order of the National Labor Relations Board is set forth in the Appendix to this petition, commencing at page A-30, *infra*.

The Decision and Order of the Administrative Law Judge of the National Labor Relations Board is set forth in the Appendix to this petition, commencing at page A-1, *infra.*

JURISDICTION

The Decision and Order of the Court of Appeals for the Seventh Circuit sought to be reviewed is dated April 4, 1974; that Court's Judgment is dated May 2, 1974. Petitioners filed a timely motion for a Stay of Mandate pending application for a Writ of Certiorari which was granted by the Court of Appeals by order dated May 14, 1974, as set forth in the Appendix at page A-62, *infra.*

Jurisdiction is conferred upon this Court to review the Decision and Order here in question by Writ of Certiorari as provided in Title 28 United States Code Par. 1254(1).

QUESTIONS PRESENTED

1. Whether the Petitioners, by separately purchasing the assets of individual retail supermarkets from a national supermarket chain, are successor-employers required to recognize and bargain with unions recognized by the predecessor-employer in multi-store bargaining units.

2. Whether Petitioner Zim's Foodliner, Inc., if a successor-employer, lawfully made unilateral changes in wages and hours shortly after opening for business.

3. Whether Petitioner Zim's Foodliner, Inc. lawfully made statements of economic consequences of unionization to three employees.

4. Whether the Court of Appeals for the Seventh Circuit in granting enforcement to the Decision and Order of the National Labor Relations Board has unreasonably extended the law of successorship under federal labor law and whether in so doing the Court of Appeals has rendered a decision in conflict with decisions of other Courts of Appeals on the same matter.

STATUTES INVOLVED

The National Labor Relations Act, Section 7, Title 29 United States Code Par. 157, provides as follows:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) [Title 29 United States Code Par. 158(a)(3)]."

The National Labor Relations Act, Section 8(a), Title 29 United States Code Par. 158(a), provides in relevant part as follows:

> "(a) It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 [Title 29 United States Code Par. 157];
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a) [Title 29 United States Code Par. 159(a)]."

The National Labor Relations Act, Section 8(c), Title 29 United States Code Par. 158(c), provides as follows:

> "(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of

the provisions of this sub-chapter, if such expression contains no threat of reprisal or force or promise of benefit."

The National Labor Relations Act, Section 9(a), Title 29 United States Code Par. 159(a), provides in relevant part as follows:

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *"

STATEMENT OF THE CASE

A. The Transfer of Ownership

Petitioners own and operate retail IGA grocery stores in the rural southwestern Wisconsin communities of Monroe and Edgerton. Both stores until the summer of 1971 had been owned and operated by the Kroger Company, one of the nation's largest retail supermarket chains, as part of its fifty-seven store Wisconsin Division.

For a number of years prior to 1971, Kroger had entered multi-store bargaining unit agreements with Retail Clerks Union Local No. 1401, RCIA, AFL-CIO (hereafter referred to as "Retail Clerks Union") covering *eleven* stores and with Amalgamated Meat Cutters and Butcher Workmen of North America, Local 444, AFL-CIO (hereafter referred to as "Meat Cutters Union") covering *five* stores. Kroger's stores at Monroe and Edgerton had been included in these units. Kroger's personnel director, located at corporate headquarters, was responsible for local store labor relations and personnel matters. Local store managers had only limited authority to implement management labor relations policies. Kroger business operations were uniform in all

stores and decision-making by local store managers was limited. Matters such as merchandising, purchasing, pricing, advertising and lay-out were programmed and tightly controlled by Kroger for chain-wide uniformity. Local store managers had no discretion to modify Kroger programs.

In June, 1971, Kroger began to sell on a store-by-store basis its entire fifty-seven store Wisconsin Division, including the Monroe and Edgerton stores.

Certain inventory, fixtures and equipment of Kroger's Monroe store were purchased by Lowell D. Zimmer, owner of Petitioner Zim's Foodliner, Inc., who previously had been the manager of a Kroger store in Madison, Wisconsin. Certain inventory, fixtures and equipment of Kroger's Edgerton store similarly were purchased by Paul Sanderson and Fred Oreel, the owners of Petitioner S & O, Inc. Sanderson previously had been the manager of a Kroger store in Mauston, Wisconsin. The purchasers assumed Kroger's leases at the Monroe and Edgerton locations. Petitioners did not assume any of Kroger's liabilities; nor did they purchase good will. Petitioners specifically refused to assume the labor agreements then in force between Kroger and the unions.

B. The Nature of Changes

After Kroger closed its stores on July 24, 1971, Petitioners cleaned and restocked their stores for opening. A majority of the employees hired by Petitioners had been Kroger employees, but they did not constitute a majority of the employees in Kroger's multi-store bargaining units. Petitioners opened for business on July 27, 1971. Each store had been converted by the Petitioners individually from a division of a national supermarket chain to an individually-owned and individually-operated store. All personnel and labor relations matters thereafter were determined and effectuated locally by Petitioners. Following the purchases, these employees dealt directly on an

intimate, face-to-face basis with their employers, as contrasted with Kroger's remote, hierarchical structure. Employees' job duties changed substantially.

All business operations and plans were now determined and effectuated locally, with employees directly involved in product ordering, price negotiation and retail pricing. Many other changes were made in all aspects of business operations. Petitioners experienced severe decreases in weekly gross sales from Kroger's sales records at their respective stores. About three weeks after opening for business, Petitioner Zim's Foodliner, Inc. unilaterally changed employees' wages and hours from those previously paid or observed by Kroger. Petitioner S & O, Inc. made no changes in wages and hours from those it established when it opened for business.

After Petitioners opened for business, the Retail Clerks Union and the Meat Cutters Union demanded that Petitioners recognize and bargain with them and that Petitioners honor the collective bargaining agreements that had been entered into with them by Kroger. Petitioners refused these demands and the unions filed charges with the National Labor Relations Board alleging that Petitioners by their refusals violated Sections 8(a)(1) and (5) of the National Labor Relations Act, Title 29 United States Code Par. 158(a)(1) and (5).

C. The Statements of Economic Consequences

During mid-August, 1971, prior to making the unilateral changes, Zimmer spoke with three of his employees, advising them that he "wasn't making any money" and that because of fixed costs "about the only thing he could switch would be wages." He advised them that if he had to pay Union scale, "he would be bankrupt" and "have to close the doors"; and that he "would have to put [the employees'] wages down to what some of the other merchants in town are getting."

D. The Decisions and Orders Here at Issue

The Administrative Law Judge by a Decision and Order dated June 23, 1972, held that Petitioners are successors under the federal labor laws upon his finding that the nature of the "employing industry" had not changed. He found that Petitioners had violated Sections 8(a)(1) and (5) of the National Labor Relations Act, Title 29 United States Code Par. 158(a)(1) and (5), by refusing to recognize and bargain with the unions. He further found that Petitioner Zim's Foodliner, Inc. had violated the same sections by unilaterally changing wages and hours in mid-August, 1971, shortly after opening for business, as well as Section 8(a)(1) by making statements of economic consequences of unionization to three employees. However, he held that Petitioners under *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), had no obligation to honor the unions' contracts with Kroger. Whereupon, the Administrative Law Judge recommended an Order that Petitioners recognize and bargain with the unions and that Petitioner Zim's Foodliner, Inc. make whole its employees for losses suffered due to its unilateral changes.

The National Labor Relations Board adopted the Order of the Administrative Law Judge on February 16, 1973.

By its Decision dated April 4, 1974, the United States Court of Appeals for the Seventh Circuit over the vigorous and well-reasoned dissent of Circuit Judge Pell denied review and granted enforcement of the Board's order.

E. The Scope of This Petition

This petition includes the questions of the successorship of the Petitioners; the right of Petitioner Zim's Foodliner, Inc., if a successor, to unilaterally change hours and wages shortly after opening for business; and the right of Petitioner Zim's to make certain economic predictions to its employees.

REASONS FOR ALLOWANCE OF WRIT

THE UNITED STATES SUPREME COURT SHOULD EXERCISE ITS DISCRETION IN THIS CAUSE, FOR THE SPECIAL AND IMPORTANT REASONS THAT PETITIONERS ARE NOT SUCCESSORS UNDER THE FEDERAL LABOR LAWS, THAT PETITIONER ZIM'S LAWFULLY MADE UNILATERAL CHANGES AND STATEMENTS OF ECONOMIC CONSEQUENCES, THAT THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER COURTS UNREASONABLY EXTENDING THE SUCCESSORSHIP RULE, AND THAT THIS COURT SHOULD SETTLE THOSE IMPORTANT QUESTIONS OF FEDERAL LAW.

In his dissent in this cause, Circuit Judge Pell (page A-55-56, *infra*) states:

> Because of the drastic differences between the operational structures and practices of Kroger, on the one hand, and the sole proprietorship, non-chain grocery stores, on the other, the *"wholly different case"* adverted to in *NLRB* v. *Burns Int'l. Security Services,* 406 U.S. 272, 280 (1972), is presented here.*** (Emphasis added.)

Petitioners concur and submit that the instant case is the farthest judicial extension to date of the laws of successorship. Indeed, it is implicit in the majority opinion here in question that this is a case of first impression. (Pages A-43-44, *infra.*) Accordingly, this cause presents a significant opportunity for the United States Supreme Court to clarify the federal labor law of successorship, an imprecise and unpredictable area of the law which has been appropriately referred to as ". . . shrouded in somewhat impressionist approaches." *NLRB* v. *Burns Int'l. Security Services, Inc.,*

406 U.S. 272, 299 (1972) (Rehnquist, J., dissenting, quoting Leventhal, J.).

A. Successorship

The essential question in determining successorship status is whether the "employing industry" retained its identity and continuity to a degree sufficient to make it reasonable that the purchaser-employer be required to recognize and bargain with an incumbent union. *Tom-A-Hawk Transit, Inc.* v. *NLRB,* 419 F.2d 1025 (7th Cir., 1969). A bona fide purchaser is not ipso facto a successor bound to recognize and bargain with an incumbent union. *NLRB* v. *Alamo White Truck Service, Inc.,* 273 F.2d 238 (5th Cir., 1959). Many factors of successorship have been enumerated in the various Court and NLRB decisions, *e.g.* whether administration, management, labor relations authority, job duties and employee complement have changed. An unenunciated, underlying factor seems to be: What result is required under the federal labor laws to do justice and be fair to the employers, employees and unions involved in this situation? Petitioners submit that justice has not been afforded the parties in this cause.

The decision of the Court of Appeals for the Seventh Circuit conflicts with the clearly analogous decision of the Fifth Circuit in *NLRB* v. *Alamo White Truck Service, Inc., supra,* in which that Court found that a purchaser-employer, a small, local business which had purchased a branch operation from a nationwide corporation, was not a successor.

Similarly, the Seventh Circuit opinion conflicts with that of the District of Columbia Circuit in *Int'l. Ass'n. of Machinists, District Lodge 94* v. *NLRB,* 414 F.2d 1135 (1969), cert. den. 396 U.S. 889 (1969), wherein the Court denied successorship upon the separate sale of two retail automobile dealerships which previously had been included in a single collective bargaining unit.

The factors relied upon most heavily by the Courts in *Alamo White Truck, supra,* and *District Lodge 94, supra,* are present here: the change to local control of business operations and labor relations from a nationwide hierarchical structure and the new localized small business objectives.[1] Petitioners can conceive of no change in the "employing industry" more fundamental and important than that which occurs when an economically powerful national chain is converted into what is essentially a "Ma-and-Pa" proprietorship operation. Perhaps the greatest shortcoming of the majority's decision herein is its failure to give any weight to this key factor, which is certain to have a material effect upon employee sentiments and expectations. *NLRB* v. *Armato,* 199 F.2d 800, 803 (7th Cir., 1952). Petitioners submit that the conflict among the Circuits caused by the instant decision has created additional unpredictability in the area of successorship law which should be resolved by this Court.

The record is devoid of evidence that any employee of Petitioners desired continued union representation. This Court has repeatedly emphasized in *Burns, supra,* that a recent certification, absent here, is a significant factor in successorship cases, for the reason that the employees had expressed their sentiments not long before the change of

---

[1] Successorship has been denied by the NLRB on similar grounds in other cases, *e.g.: Atlantic Technical Services Corp.,* 202 NLRB No. 13 (1973) (Atlantic succeeded to work performed by fraction of a TWA unit); *American Concrete Pipe of Hawaii, Inc.,* 128 NLRB 720 (1960) (". . . a small portion of the unit described in the certification was splintered from the larger part of the unit and put in independent operation under a different company."). Petitioners are unaware of any decision of any Court of Appeals or of the NLRB, other than the instant cause, in which successorship was found after the purchase by a local owner of one store in a multi-store unit or of a small portion of the seller's unit.

ownership. In the instant case, the unions' certification status is ". . . lost in ancient history." (Page A-57; Pell, J., dissenting). Where the unions' stale unit certifications have been materially fragmented and purchasers have acquired the assets of small portions of those units, as in the instant case, the federal labor policy is best served by allowing purchasers to take those assets free and clear of any duty to bargain based upon any successorship finding.

A finding of non-successorship would likewise be just to the employees and the unions, for the question of union representation in the fragmented units could easily be settled by a secret ballot election at each store. This would be preferable to the artificial imposition of a rather feeble NLRB rebuttable presumption that the prior multi-store unit majority continues as to a splintered part of that unit. The error of the majority in treating each fragment as a "miniature" of the former multi-store units is all the more apparent in view of the fact that the stores within the unit were spread over a wide and economically diverse geographic area.

The attempt of the majority to justify reliance upon the presumption of continued majority on the basis of ". . . stability in the labor relations area . . ." (page A-43, *infra.*) is misplaced. On the record of this case, a finding of successorship was in no sense essential to industrial stability. To the contrary, the finding herein, Petitioners believe, does great violence to the principle of employee self-determination.

B. Unilateral Changes

If this Court determines to grant this Writ, and thereafter finds that Petitioners are not successors, then the issue of the legality of unilateral changes in wages and hours by Petitioner Zim's Foodliner, Inc. is moot. However, if this Court declines to review the successorship issue or upholds the Court of Appeals on that issue, the issue of unilateral changes remains.

The Court of Appeals has applied in an overly rigid and literal manner the rules suggested by this Court concerning unilateral changes:

> "* * * It is difficult to understand how Burns could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and prior to [the date of takeover], no outstanding terms and conditions of employment from which a change could be inferred. The terms on which Burns hired employees for service after [the date of takeover] may have differed from the terms extended by [the predecessor] and required by the collective bargaining contract, but it does not follow that Burns changed *its* terms and conditions of employment when it specified the initial basis on which employees were hired. * * *" *NLRB* v. *Burns Int'l. Security Services, Inc.*, 406 U.S. 272, 294 (1972).

In the instant case, Petitioner Zim's Foodliner, Inc. continued the wages and hours previously observed by Kroger at Monroe for about three weeks after opening for business. The Court of Appeals concluded that the unilateral changes were unlawful because Zim's Foodliner, Inc. delayed three weeks in reducing wages or altering hours, rather than making those changes prior to hiring employees.

Petitioners believe that this decision conflicts with that of the Court of Appeals for the Sixth Circuit in *NLRB* v. *Wayne Convalescent Center*, 465 F.2d 1039 (6th Cir., 1972). In *Wayne,* a purchaser succeeded to the operations of a single-unit nursing home. About one month thereafter, the purchaser made unilateral changes in wages and benefits. Although the Court of Appeals found successorship (unlike the present case the purchaser succeeded to an entire unit) the Court found that the unilateral changes were not unlawful. The changes were, in the Court's opinion, ". . . merely the initial terms of employment established by Wayne."

Burns, supra, does not demand that all initial terms be set prior to a successor's opening for business.

A successor must be free to establish "initial" terms. Otherwise, a potential successor's desire to acquire a marginal business would be further inhibited. *Wayne, supra* at 1043. As in *Wayne,* this Petitioner, even if a successor, should be found to have lawfully changed wages and hours under the compelling economic circumstances following the purchase. That Zim's set "initial" terms three weeks after opening rather than prior to opening, should not be considered material in light of the initial economic instability of the enterprise. The timeliness of these changes suggests that no violation of law occurred due to the presence of these ". . . circumstances excusing or justifying unilateral action." *NLRB* v. *Katz,* 369 U.S. 736, 748 (1962); *Overnite Transportation Co.* v. *NLRB,* 372 F.2d 765, 769 (4th Cir., 1967), cert. den. 389 U.S. 838 (1967).

C. Economic Statements

The Court of Appeals (page A-40) conceded in its opinion that Zimmer's statements to three employees concerning economic problems and consequences of unionization ". . . in context seem to indicate a good faith concern about high labor costs and an inability to compete." The record is devoid of evidence or suggestions of expressions containing threats of reprisal or force or promises of benefit. The statements did not occur during any union representation campaign or at any other time when employee attitudes are a matter of vital concern.

This Court has not yet ruled whether the severe burden of proof placed upon employers by *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 618-619 (1969) is applicable to statements made in the context of a successorship dispute, rather than during an active union organizational campaign. Petitioners submit that this Court should settle this important question of federal successorship law.

CONCLUSION

The United States Supreme Court should issue the Writ of Certiorari prayed for by Petitioners.

Dated this 10th day of June, 1974.

Respectfully submitted,

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APPENDIX

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

LOWELL D. ZIMMER d/b/a ZIM'S IGA FOODLINER and RETAIL CLERKS UNION LOCAL NO. 1401, affiliated with the RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO and LOWELL D. ZIMMER d/b/a ZIM'S IGA FOODLINER and AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL 444, AFL-CIO	Case No. 30-CA-1696 and Case No. 30-CA-1716, Consolidated
and DORANCE J. BENZSCHAWEL AND TERRENCE D. SWINGEN, CO-PARTNERS d/b/a PARKWOOD IGA and RETAIL CLERKS UNION LOCAL NO. 1401, affiliated with the RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO	Case No. 30-CA-1715
and S & O, d/b/a PAUL'S IGA FOODLINER and RETAIL CLERKS UNION LOCAL NO. 1401, affiliated with the RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO	Case No. 30-CA-1722

ADMINISTRATIVE LAW JUDGE'S DECISION

Statement of the Case

BENJAMIN B. LIPTON, Trial Examiner: These consolidated cases were tried before me on January 18 and 19,

1972,[2] in Madison, Wisconsin, upon separate complaints by the General Counsel against each of the above-captioned Respondents alleging certain violations of Section 8(a)(5) and (1) of the Act.[3] Comprehensive briefs were filed by the General Counsel, Retail Clerks, Meat Cutters, and on behalf of the respective Respondents.

On the entire record in the cases, and from my observation of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

In Case No. 30-CA-1715, the Respondent, herein called Respondent Parkwood, since July 26 has been engaged in the retail sale of groceries at a store located in Middleton, Wisconsin. In Case No. 30-CA-1722, the Respondent, herein called Respondent Paul's, since July 27 has operated a retail grocery store in Edgerton, Wisconsin. In Cases Nos. 30-CA-1696 and 1716, the Respondent, herein called Respondent Zim's, since July 27 has operated a retail grocery store in Monroe, Wisconsin. Each Respondent admits that, on a projected basis, its annual gross sales will exceed $500,000, that it will have an indirect inflow of goods and materials in interstate commerce valued in excess of $50,000, and that, during the period of 4 months since it

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[2] All dates are in 1971, unless otherwise specified.

[3] In Cases Nos. 30-CA-1715 and 1722, the original charges were filed and served, respectively, on September 15 and 22. In Cases Nos. 30-CA-1696 and 1716, the original charges were filed and served, respectively, on August 27 and September 16. On December 23, separate complaints were issued in the former two cases, and a consolidated complaint in the latter two cases. On motion jointly by the Respondents herein, all the cases were consolidated for hearing by order dated January 4, 1972.

began operations, its gross sales have exceeded $200,000. It is admitted and I find, that each Respondent is engaged in commerce within the meaning of the Act.

II. The Labor Organizations Involved

Retail Clerks Union Local No. 1401, affiliated with the Retail Clerks International Association, AFL-CIO, herein called the Retail Clerks, and Amalgamated Meat Cutters & Butcher Workmen of North America, Local 444, AFL-CIO, herein called the Meat Cutters, are labor organizations within the meaning of the Act.

III. The Unfair Labor Practices

A. Introductory Facts and Description of Issues

In June 1971, the Kroger Company, herein called Kroger, following its decision early that year to terminate all operations in Wisconsin, undertook to sell on a piece-meal basis all its 57 retail food supermarkets in the State. In existence were collective-bargaining agreements with various locals of the Retail Clerks and the Meat Cutters. The Monroe, Edgerton and Middleton stores were part of a multi-store unit of grocery employees in the Madison area (about 11 stores)[4] covered in a union security agreement with the Retail Clerks. The Monroe store, solely involved in Case No. 30-CA-1716, similarly under the contract with Kroger, was part of a multi-store unit (about 5 stores) of meat department employees. Both contracts had terms extending into 1973. On July 19, each Respondent executed with Kroger a purchase agreement to acquire the respective stores at Monroe, Edgerton, and Middleton. On July 24, Kroger ceased all operations at these stores. And on July 26, each Respondent completed the purchase from

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[4] Including Reedsburg, involved in another proceeding. See fn. 6, *infra*.

Kroger (by bill of sale) of certain tangible assets and was assigned the leasehold interest of their respective stores. Thereafter, within a brief interval, each Respondent hired certain of Kroger's employees formerly employed at the particular store and commenced operation of a grocery supermarket at this location—continuing to the present.

Virtually all the issues are raised in the complaints under Section 8(a)(5) on the successorship principle. Each Respondent admits the factual allegations that, in each case, a single store unit as alleged in the complaint is appropriate for bargaining, and—that, since July 26 or 27, it has refused the particular demands of the union involved for recognition and bargaining, and fulfillment of all obligations of the collective-bargaining contracts pre-existing with Kroger as relates to the employees in the admitted unit or units at each store. The separate Respondents also specifically admit in answer to the complaints:

Cases Nos. 30-CA-1696 and 1716—Monroe store

That, since on or about August 19, it refused to recognize and process grievances submitted by the Retail Clerks on behalf of the grocery unit employees.

That, since on or about August 20, it unilaterally reduced the working hours in the unit of meat department employees.

That, since on or about September 1, it unilaterally reduced the working hours in the unit of grocery employees.

That, since early October 1971, it unilaterally reduced the wage rates of the grocery unit employees.

That, since on or about October 1, it unilaterally discontinued the existing health insurance program for the employees in the grocery and meat department units.[5]

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[5] At the hearing it was stipulated that, in mid-August, Respondent Zim's unilaterally reduced the wage rates for employees in the Retail Clerk's unit and reduced the hours of employees in both units; and that these rates and hours have since been maintained.

Case No. 30-CA-1722—Edgerton store

That, since on or about July 27, it unilaterally reduced the wage rates and working hours, and discontinued the existing health insurance program, affecting the grocery unit employees.

Case No. 30-CA-1715—Middleton store

That, since on or about July 26, it unilaterally reduced the wage rates, and discontinued the existing health insurance program, affecting the grocery unit employees.

Each Respondent denies the major allegation that it is the legal successor to Kroger at its particular store, and contends in effect that it is not bound to honor the Kroger contract, or to recognize and bargain with the union or unions previously representing certain of its employees. Each Respondent also contends that a terminal supplement, executed between Kroger and the respective unions herein, to settle all issues and claims between these immediate parties leaves no surviving contract or obligation which would bind it as a successor.[6] The complaint as to Respondent Zim's also alleges certain coercive conduct in violation of Section 8(a)(1), which is denied in the answer of this Respondent.

On May 15, 1972, the Supreme Court handed down its decision in the *Burns* case.[7] The clear and unanimous holding of the Court is that successor employers are not bound by the substantive provisions of a collective-bargaining agreement negotiated by their predecessors but not agreed to or assumed by them. While the majority of the Court

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[6] Similar issues are presented in *Fred's Inc., d/b/a Fred's Foodliner,* Case No. 30-CA-1704, issued in my decision this day, involving the Reedsburg store purchased from Kroger under identical circumstances.

[7] *N.L.R.B.* v. *Burns International Security Services,* 80 LRRM 2225.

found that, in the particular circumstances,[8] that Burns was a successor employer and obligated to recognize and bargain with the union established as the representative of the predecessor's employees in the appropriate unit,[9] the Court was unanimously agreed on the following further results, directly or in necessary effect: (a) With certain exceptions, the successor employer "could not be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit. . . ." The exceptions are, e.g., where it is perfectly clear that the new employer plans to retain all the employees in the unit and it is appropriate to have him initially consult with the union before he fixes the terms of employment as to these employees; or where the new employer unilaterally changes the employment conditions it had offered to potential employees after his obligation to bargain with the union became apparent or matured. (80 LRRM 2233, 2234 (b) A new employer is not obligated to hire the employees of its predecessor, unless it effectively assumed such an obligation or is discriminatorily motivated in its refusal to hire such employees.

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[8] The majority opinion states that resolution of the principle issues — the alleged refusal to bargain and to honor the pre-existing contract — "turns to a great extent on the precise facts involved here." This statement, made at the outset of the Court's discussion, by no means indicates that the case is *sui generis;* various distinguishing fact situations are well defined throughout the detailed consideration of the issues.

[9] Burns was the successful bidder on a contract to supply plant guard services at a facility of an aircraft company, replacing Wackenhut Corporation, a Burns competitor, whose employees were represented under contract by a recently certified union. There was no issue before the Supreme Court as to the appropriate unit, which the Board had found to be the same unit in effect under Wackenhut. Burns hired 27 of Wackenhut's guards, who were found to constitute a majority of the 42 guards in the unit under Burns.

Thus, as I conclude, the Supreme Court in *Burns* has now settled and in effect eliminated all the issues herein based upon General Counsel's theory of successorship, excepting only the complaint allegations—that each Respondent generally refused to recognize and bargain with the unions involved; that it engaged in unilateral actions after having commenced operations and being cognizant of the union bargaining demands; and that Respondent Zim's refused to process grievances, and committed Section 8(a)(1) conduct.

B. The Evidence

The pertinent facts are substantially without dispute. As earlier described, there is no issue as to the appropriateness of the single store units at the Monroe, Edgerton and Middleton stores in question. Until Kroger ceased operations on July 24, it had an existing union security contract with Retail Clerks covering the meat department employees at Monroe. Between June 16 and July 13, both unions and Kroger conducted negotiations and, on the latter date, executed identical supplements to each contract—"in consideration for the Employers' termination of the Employees . . . which resulted from the Employer's closing of its Wisconsin operation and this Agreement settles all issues and claims concerning said termination and closing." In substance, Kroger agreed to pay the health and welfare premiums for 2 months following the employees' termination and to make specified payments relating to pension, holidays, and vacations.

In the terminal negotiations, Kroger in effect advised the unions involved that it would submit to all prospective purchasers a clause requiring the purchaser to assume the existing bargaining contract, but it would not require such contract assumption as a condition of the sale.[10]

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[10] Some of the purchasers did agree in this manner to assume the union contract.

Gateway Foods, Inc., herein called Gateway, had been the general supplier to Kroger of dry groceries for the Wisconsin stores excluding the Milwaukee area. In 1971, Gateway negotiated with Kroger for the purchase of a group of stores in central Wisconsin.[11] Ultimately, Gateway did not buy any of the stores directly for itself, but was instrumental in assisting and financing the acquisition of particular stores by certain persons, including the Respondents herein.[12] As noted, on July 26, each Respondent perfected the purchase[13] of their respective stores.[14] The purchase agreements executed by each Respondent has no provision for the buyer's assumption of the union contract.[15] Before the purchases of these stores were effected, Gateway and each of the Respondents were fully aware of the existence of the union contracts covering the Monroe, Edgerton and Middleton stores.

On July 14, effective as of July 26, an "Operating and Security Agreement" was entered into between each Respondent and Gateway. It states, as consideration for such

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[11] When Kroger decided to go out of business in Wisconsin, Gateway brought suit to prevent it, based on its claimed right of first refusal to purchase all the stores.

[12] Respondent Paul's, for example, indicated that it relied on Gateway's recommendations to purchase the store.

[13] The purchase price for the Monroe store was $50,000, for Edgerton, $35,000, and for Middleton, $65,000, covering equipment, furniture and fixtures; the merchandise inventory was paid for separately on the basis of a specified price formula.

[14] On July 24, Kroger assigned to Gateway its leases to each of the stores in question, and Gateway, on July 26, subleased to each of the Respondents.

[15] The purchase agreement contains a clause, in substance, that the buyer assumes no liabilities or obligations of Kroger, and that Kroger agrees to indemnify and hold the buyer harmless against all liabilities, claims and costs arising out of any event or transaction prior to July 25, 1971.

agreement, that the particular store is being purchased with Gateway's "direct financial assistance," as evidenced by a certain "guarantee of promissory note" to a bank. The comprehensive document provides, in part, that the "Debtor" (i.e., each Respondent):

> shall cooperate and participate fully with any IGA franchise program now offered or hereafter offered by Gateway Foods but not limited to, advertising, complete accounting, and accounts payable service and blank check purchases plan. . . .
>
> shall make at least 60% purchases of all merchantable products, trading stamps, if given, and supplies based on retail sales from Gateway to the extent Gateway makes the same available either directly or indirectly, through its accredited suppliers. If Debtor make[s] any of [its] purchases from other than Gateway or its authorized outside suppliers, [it] shall immediately pay to Gateway two percent (2%) of the cost of such unauthorized purchases, or shall make such purchases through the Gateway Central Billing System. (Sec. 1)
>
> shall conduct [it]s said business . . . in accordance with the standards set forth in any Retailer Franchise and Cooperative Merchandising Plan, and in accordance with any instructions or regulations thereto which Gateway may subsequently promulgate. The store shall bear the identification of IGA. . . . Debtor agree[s] to cooperate with the entire IGA program . . . as administered by Gateway, including . . . advertising programs, merchandising methods, promotional plans, group insurance programs, store engineering plans and procedures, retailing accounting services and training programs. (Sec. 5)
>
> grant[s] to Gateway the first option to purchase said retail business at any time while this Agreement remains in force and effect. (Sec. 7)

..

> *Section* 4. In the event Debtor should default on the payment of any sum to be paid hereunder or fail to perform at the time and in the manner herein specified any term or covenant in this Agreement . . . Gateway may terminate this entire agreement including the lease, if any, of premises . . . [and] shall have full and complete authority and right to immediately enter upon the premises and conduct the business thereon.[16]
> *Section* 8. Termination of Agreement. This Operating Agreement . . . shall remain in full force and effect so long as said Debtor continue[s] to own or operate said retail business, or any part thereof . . . unless Gateway consents in writing to its termination. . . . Provided, however, that Section 1 of this Operating Agreement shall cease to be of any force and effect upon the Debtor satisfying in full all financial obligations to Gateway or its subsidiaries.

Testimony on the part of the respective Respondents appears to take the position that the purchasing, advertising, merchandising and other specified policies of Gateway and IGA have not been strictly followed or are not intended to be binding. The essential fact is that these Respondents are bound by their agreement, the terms of which can be enforced by Gateway at its will, even assuming that aspects of the agreement were not fully pursued by Gateway during the early stages of Respondents' operation of their stores.

The Monroe store was purchased by Lowell Zimmer as an individual and was later incorporated. Zimmer previously held various supervisory positions with Kroger, including that of store manager of certain stores other than

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[16] In the Security Agreement, Gateway was granted a continuing interest and mortgage respecting virtually all tangible and intangible assets of the store.

Monroe, and zone manager of the stores covered in the Madison area contract, which embraced Monroe. Zimmer, as owner, actively engages in the management of the store. When he opened the store on July 27, he employed the entire Monroe complement of Kroger. Marcus Pink, the former store manager, was retained by Zimmer in the same position, with similar responsibilities. Also employed were Kroger's 16 grocery employees and 3 meat department employees.[17]

The Edgerton store, operated by Respondent Paul's, is 75 percent owned by Paul Sanderson, and the balance by Fred Oreel.[18] Previously, Sanderson was a store manager at another Kroger store in the general area for 19 years. Kroger's store manager at Edgerton, James Wedeward, was continued in the same position with this Respondent. At the closing, Kroger had 14 employees in this store represented by the Retail Clerks. Of these, 9 were hired by Respondent, comprising with the addition of Sanderson's wife, son, and daughter, the entire grocery work force.[19]

The Middleton store, operated by Respondent Parkwood, is owned by Dorance J. Benzchawal and Terrence Swin-

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[17] In November, one of the meat department employees, being dissatisfied with his reduced hours, voluntarily quit, and has not since been replaced. There is no issue as to constructive termination.

[18] Oreel is the full owner of the Reedsburg store, similarly purchased from Kroger. See fn. 6.

[19] Sanderson stated there were 20 to 25 applicants, of whom he hired 9 employees, all previously with Kroger at this store. I cannot accept his testimony that he only knew that 4 of these employees were previously with Kroger and that he was unaware of Kroger's contract with the Retail Clerks. His 25 percent partner, Oreel, admittedly knew of the contract; and stipulations cover the point of awareness.

gen, as co-partners. Theretofore, Benzschawal had been the store manager and Swingen the head meat cutter at a Kroger store in Madison. At the closing, Kroger had 12 employees at this store, under the contract with the Retail Clerks. Respondent Parkwood hired only one of these employees, Vernon Lewerenz, in its total grocery complement of 5 employees, excluding the owners and their immediate families. Of the others, one employee, Bill Sebert, had no prior employment with Kroger. Another, Janet Rusu, had worked for Kroger at a store in Madison, but only until November 1970. Jerome Bentzler and Ronald Kummerow were previously employed by Kroger at a Madison store within the Retail Clerks' coverage. Kummerow withdrew his union membership effective as of August 1.[20]

Other facts are substantially the same as to all three stores. Only the owners and store managers possess and exercise supervisory authority. Grocery, produce and meat comprise the three departments in the store. In each of these departments, Kroger had nonsupervisory department heads and various classifications of employees. Under the Respondents, the employees have no specific titles or classifications, but they perform essentially the same primary job functions as they did with Kroger. The basic supermarket operation, consisting of stocking merchandise, customer self-service, and the use of checkout counters for bagging and payment, — remains unchanged.

Relating to the successorship issue, the Respondents adduced evidence and argue that the organizational structure and operating methods of their respective stores are materially different from those in effect under Kroger. Certain of these distinctions are, in my opinion, not of major consequence respecting this issue, and need not be

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[20] He began employment at Middleton on July 26, and the date he applied for a withdrawal card is not shown.

fully detailed.[21] The more significant differences stem from the conversion of each store in question from a division of Kroger's nationwide supermarket chain to an individually owned and operated store. Thus, Kroger's merchandising, pricing, promotion, traffic and the like were centrally controlled for groups of stores. While the store managers could, for example, reduce prices on damaged merchandise and make recommendations on purchases and other matters, general policy required them to adhere to Kroger's established programs. With the Respondents, basically, all decisions are made by the owners or store managers, — albeit with long-term commitments to Gateway[22] and IGA concerning major aspects of their operations, comparable in many respects to the external control formerly exercised by Kroger.[23] All personnel matters are handled by Respond-

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[21] E.g., Respondents operate a friendlier store; spend less money than Kroger for advertising; purchase and sell more local products; generally have a lower pricing structure; do not use the Kroger label on certain products, but have the IGA label on certain products; sell a smaller variety of precut meat products, thus requiring more cutting in the store; do not use trading stamps as did Kroger; remain open 7 days a week for longer hours, compared to 6 days under Kroger; obtain some of their merchandise from suppliers other than those previously used by Kroger, whereas Kroger had its own meat plant and bakery, and manufactured some of its own grocery products, all of which were supplied to its stores in the area. (Each of these factors does not necessarily apply to all the Respondents.)

[22] I.e., the Operating and Security Agreement, as set forth in part, *supra*.

[23] It is also noted, for example, that Kroger had purchased for the individual stores about 75 percent of its grocery items from Gateway, while each Respondent was required to purchase from Gateway at least 60 percent of all merchantable products.

ents on the local scene[24]. Under Kroger, the wages, hours, and conditions of employees were essentially fixed in the union contracts. Certain broad policies affecting the employees emanated from a regional office and were implemented by the zone and store managers. Hiring, discharge, and disciplinary matters were conducted at the store level, and submitted by recommendation to Kroger's personnel department for final approval or disapproval. It does not appear that grievances were a frequent problem with Kroger or with the Respondents.[25]

On July 23, the Retail Clerks wrote its first letter to each Respondent, demanding assumption of all the obligations of the contract with Kroger, a copy of which was enclosed. It requested immediate advice "if there are any special circumstances," and offered to discuss such matters in a meeting. Further letters by Retail Clerks were sent to Respondent Zim's on and subsequent to August 13; to Respondent Paul's on and subsequent to July 27; and to Respondent Parkwood on September 16 and 27. On July 25 and in mid-August, the Meat Cutters verbally requested Respondent Zim's to discuss the existing contract covering the Monroe store, and by letter on August 20, it described its demands for recognition, bargaining, and adoption of the Kroger contract.

Answering each of the complaints, the respective Respondents specifically admit that, since July 26 or 27, they have refused and continue to refuse to bargain in good faith with the Retail Clerks and the Meat Cutters as exclusive representatives in the admitted appropriate units of the

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[24] Note, however, that Section 5 of the Operating and Security Agreement, *supra,* requires that the Respondents cooperate with the entire IGA program, as administered by Gateway, including group insurance and training programs.

[25] E.g., testimony of Sanderson as to his experience.

single stores.[26] As already shown, when the stores were first opened for business, the separate units of the Retail Clerks and the Meat Cutters at the Monroe store, and the Retail Clerks' unit at the Edgerton store, consisted entirely of former Kroger employees from each of these stores, — or an obvious majority in each of such units.[27] As relates to the Middleton store, the majority question will be treated *infra.*

Concerning the alleged Section 8(a)(1) violation by Respondent Zim's, the testimony of three grocery employees is uncontradicted that, in mid-August and about August 23, Zimmer told each of them he could not afford to pay the wages provided in the Retail Clerks' contract and would go out of business if the employees voted for the Retail Clerks as their bargaining representative.

C. Conclusions

The appropriate bargaining unit alleged in each of the complaints involving the Retail Clerks, and admitted by the respective Respondents, as to the single stores at Monroe, Edgerton and Middleton, Wisconsin, consists of the following:

> All employees of the Respondent at the particular store locations, excluding the store manager, co-manager, meat department employees, stock auditors, specialty men and demonstrators employed by vendors, guards and supervisors as defined in the Act.

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[26] There were discussions extending over a period of time between the Retail Clerks and Respondent Paul's, and between the Meat Cutters and Respondent Zim's, concerning adoption of the Kroger contracts. Ultimately these Respondents rejected the overtures. There are no complaint allegations as to either Respondent that recognition was actually extended and new contracts finally negotiated, which they then refused to sign.

[27] The immediate families of the owners at Edgerton and Middleton would not be properly included in the unit. Sec. 2(3) of the Act.

The admitted appropriate unit involving the Meat Cutters consists of —

> All meat and delicatessen employees of Respondent Zim's at its Monroe, Wisconsin, retail store, excluding all other employees, and guards and supervisors as defined in the Act.

The various contracts in evidence separately mention and deal with each of the stores,[28] particularly as to the different schedules of wage rates applicable to specific stores. It sufficiently appears that the separate identities of the Monroe, Edgerton and Middleton stores were substantially recognized in the historical bargaining agreements.[29]

As described *supra,* Respondents Zim's and Paul's, upon taking over the Monroe and Edgerton stores, respectively, hired essentially for their complete work force former Kroger employees at each of these stores represented under the union security contracts. This factor that the Respondents commenced operation of their individual stores, with virtually no hiatus, having its predecessor's employees as a majority of the work force, is a "most significant" consideration on the issue at hand.[30] Various other elements

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[28] There is no evidence of interchange of employees between the Kroger stores.

[29] *Solomon Johnsky d/b/a Avenue Meat Center,* 184 NLRB No. 94; *Ranch-Way, Inc.,* 183 NLRB No. 116, enf'd 445 F. 2d 625 (C.A. 8).

[30] *Burns, supra,* 80 LRRM at 228, fn. 4, citing with approval the lower opinion, 441 F. 2d 911, 915 (C.A. 2). See also, *N.L.R.B.* v. *Interstate 65 Corp., doing business as Continental Inn,* 79 LRRM 2122, 2125 (C.A. 6). And cf., *Lincoln Private Police, Inc., etc.,* 189 NLRB No. 103, *Tallakson Ford, Inc.,* 171 NLRB 503, and *Thomas Cadillac, Inc.,* 170 NLRB 884 (where less than a majority of the new employer's work force consisted of the predecessor's employees).

in the evidence, amply discussed *supra,* weigh in determining whether these two Respondents are successors which continued as the same employing industry[31] of their employees in the particular stores. Kroger and each Respondent operated at the same location, with substantially the same physical plant and equipment; both sought and served the same customers with the same type of products; and the employees of both had the same primary job functions, immediate supervision, and working conditions, with only minor modifications. While each Respondent's control of the enterprise and the employees is more localized, this difference is not of such magnitude as to be given controlling effect.[32] *Vis-a-vis* the employes in light of their statutory bargaining rights, it cannot be held that the nature of the employing industry in each case — that of a retail grocery supermarket — has basically changed.[33] On all these factors, and the entire record, I find that the single-store units at Monroe and Edgerton, as alleged in the complaints, are appropriate for the purposes of collective bargaining under Section 9(a) of the Act.[34]

Concerning the Middleton store, it cannot be found that Respondent Parkwood employed in its total work force a majority of its predecessor's employees as would constitute it a successor within the meaning of the *Burns* case, *supra.* As stated by the Board, the "key test in determining whether a change in the employing industry has oc-

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[31] See, e.g., *G. T. & E. Data Services Corporation,* 194 NLRB No. 102; *Ranch-way, Inc., supra.*

[32] *Ranch-Way, Inc., supra.*

[33] *N.L.R.B.* v. *Zayre Corp.,* 424 F. 2d 1159, 1162 (C.A. 2); *Tom-A-Hawk Transit, Inc.* v. *N.L.R.B.,* 419 F. 2d 1025, 1026-1027 (C.A. 7) — cases cited with approval in *Burns, supra,* 80 LRRM at 2228.

[34] See, e.g., *Ranch-Way, Inc., supra* (where the unit found appropriate as to the successor was substantially smaller than the contract unit of the predecessor).

curred is whether it may reasonably be assumed that, as a result of transitional changes, the employees' desires concerning unionization have likely changed."[35] And the Supreme Court in *Burns* indicated the criteria — whether it is reasonable to conclude that the union still represented a majority in the appropriate unit, and whether the new employer could reasonably entertain a good faith doubt about that fact.[36] This majority factor, as previously noted, is most significant in determining the overall issue of successorship. The specific evidence is that, of the five eligible grocery employees in its working complement, only one was hired from this store when last operated by Kroger. Two employees came from another Kroger store covered in the Madison area contract of the Retail Clerks. In the circumstances of this case, it may not be reasonably assumed that the desires of these two employees concerning unionization have not altered as a result of the transition, or that Respondent Parkwood could not reasonably entertain a good-faith doubt that the Retail Clerks represented a majority at its Middleton store. In any event, I find that Lewerenz' withdrawal from membership, made effective 5 days after he commenced employment with this Respondent, dissipates any reasonable assumption that the Retail Clerks in fact represented a majority in the admitted single-store appropriate unit. Accordingly, I conclude that General Counsel has failed to sustain the allegations in the complaint against Respondent Parkwood.[37]

Respondents Zim's and Paul's, in each case, employed a clear majority of Kroger's former employees in the respective units at the Monroe and Edgerton stores, and were fully aware that these employees had most recently been represented by the Retail Clerks under a union security provision. Each such Respondent admits that it has failed and refused to recognize and bargain with the particular

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[35] *Ranch-Way, Inc., supra,* 183 NLRB No. 116, at p. 4 of slip opinion.

[36] *Burns, supra,* 80 LRRM at 2227.

[37] E.g., *Tallakson Ford, Inc., supra.*

union involved, following the separate bargaining demands. Neither Respondent has based its refusal to bargain upon a good faith doubt that the demanding union represented a majority of the employees in the appropriate unit.[38]

I conclude, therefore, that Respondents Zim's and Paul's at each store stand as the legal successor to Kroger,[39] and that each violated "the express mandates of Sections 8(a)(5) and (9)(a)" of the Act[40] by its refusal to recognize and bargain with the Retail Clerks or the Meat Cutters, as the case may be,[41] on and after July 26 as to the Edgerton store, and July 27 as to the Monroe store.[42]

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[38] E.g., *Tom-A-Hawk Transit, Inc.*, v. *N.L.R.B.*, *supra*, 419 F. 2d at 1028.

[39] It is of some significance to note that the dissenting opinion of four Justices in the *Burns* case, *supra*, repeatedly emphasized a distinction that *Burns* did not purchase the business or assets of Wackenhut but instead was in direct competition with it, and that only "a naked transfer of employees" was involved. (80 LRRM at 2235, 2238). Here, of course, the Respondents did acquire the physical assets and the lease of their respective stores from Kroger.

[40] *Burns, supra*, 80 LRRM at 2228.

[41] *Ibid.* See also *Solomon Johnsky d/b/a Avenue Meat Center*, 184 NLRB 94, at p. 3 and fn. 4 of slip opinion, where the board found an independent violation of Section 8(a)(5), in addition to the violations stemming from the failure to honor the contract, "when Respondent refused to recognize the Union as the representative of Respondent's employees." The Board directly cited the evidence that, when approached, the Respondent refused to have anything to do with the union, stating "who needs you."

[42] Respondents' contention relating to the terminal supplement to the contracts executed by each of the unions and Kroger is rejected. Such an agreement between the two contracting parties resolving all claims as between themselves can in no event invest the instant Respondents with an extraordinary privilege to refuse to bargain when normally required, or operate to deny the employees their statutory rights. See *Will Coach Lines, Inc.*, 175 NLRB 518, 533.

D. The Alleged Unilateral Changes

In the terminal supplement to the contracts, described above, the existing health insurance programs for the employees in the grocery units under the Retail Clerks, and in the meat department unit (at Monroe) under the Meat Cutters, were continued for 2 months following the employees' termination by Kroger on July 24, with Kroger paying the necessary premiums. As the Respondents themselves did not accept or participate in the insurance programs, they could not be said to have changed unilaterally any pre-existing term or condition of employment without bargaining.[43] These allegations against each of the Respondents are therefore dismissed.

Although Respondent Zim's admits that, since August 19, it refused to process grievances submitted by the Retail Clerks, there is no substantive basis for finding an independent violation on this allegation as it is premised entirely upon the contention, already rejected under the *Burns* case, that Zim's was obligated to assume pre-existing contract. The grievances were related essentially to Zim's unilateral actions after commencing operation, and such conduct, as well as the general refusal to bargain, has been covered in separate findings.

Respondent Paul's at the Edgerton store commenced operation on July 26 by instituting wage rates and working hours which were less than those provided in the contract under Kroger. Similarly, this Respondent cannot be held to have made unlawful unilateral changes when it had no "previous relationship whatsoever to the bargaining unit."[44] These allegations are dismissed.

However, further violations of Section 8(a)(5) are found as to Respondent Zim's at the Monroe store on the basis

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[43] *Burns, supra,* 80 LRRM at 2233.

[44] *Ibid.*

of its admissions that, since mid-August, it unilaterally reduced the wages of the grocery unit employees, and reduced the hours of employees in the grocery and meat department units. These were clearly unilateral changes in existing employment conditions made *after* this Respondent's obligation to bargain with the Retail Clerks and the Meat Cutters had matured and was apparent.[45]

E. The Independent Coercive Conduct

It is found that Respondent Zim's violated Section 8(a)(1), as alleged, by telling three of its grocery employees that it would go out of business if the employees "voted for" (i.e., adhered to) the Retail Clerks as their bargaining representative.[46]

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondents Zim's and Paul's, set forth in section III, above, occurring in connection with their operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondents Zim's and Paul's have each engaged in unfair labor practices, I shall recommend that they cease and desist therefrom and take certain

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[45] *Id.*, 80 LRRM at 2234.

[46] E.g., *N.L.R.B.* v. *Interstate 65 Corp., doing business as Continental Inn*, 79 LRRM 2122, 2126 (C.A. 6); *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 618.

affirmative action designed to effectuate the policies of the Act.[47]

It has been found that Respondent Zim's, since July 27, has unlawfully refused to recognize and bargain with the Retail Clerks and the Meat Cutters in their respective appropriate units of employees at the Monroe store. It has also been found that Respondent Paul's, since July 26, has unlawfully refused to recognize and bargain with the Retail Clerks concerning the unit of grocery employees at the Edgerton store. It will therefore be recommended that each of these Respondents, upon request, bargain collectively with the specific union aforementioned, as the exclusive representative of its employees in the applicable appropriate unit, and embody in a signed agreement any understanding reached. As to Respondent Zim's, it has further been found that, in violation of Section 8(a)(5), it unilaterally reduced the wages of employees in the Retail Clerks' unit, and reduced the hours of employees in the units of the Retail Clerks and the Meat Cutters. It will therefore be recommended, in order to restore the *status quo ante*, that Respondent Zim's make whole the employees in both such units for the losses caused by these unilateral changes since

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[47] Consideration has been given to the request of the Meat Cutters to remedy its losses for litigation, reorganization costs and reasonable attorneys fees, to require that Respondent Zim's supply the names and addresses of the unit employees, and to have the Board seek injunctive relief under Section 10(j) of the Act. Such request, in whole or part, has not been made by the General Counsel or the Retail Clerks in connection with any of the four cases involved herein. I find that the conduct in question and defenses raised on the part of all the separate Respondents presented truly arguable issues, essentially of law, based upon the then existing Board and court precedents, and were in no manner frivolous. See *Tiidee Products, Inc.*, 194 NLRB No. 198, at pp. 10-11; *John Singer, Inc.*, 197 NLRB No. 7 (May 25, 1972).

mid-August.[48] Backpay and interest shall be computed under the established formulae of the Board.[49]

Upon the foregoing findings of fact, and upon the entire record in the consolidated cases,[50] I make the following:

CONCLUSIONS OF LAW

1. Each Respondent herein is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Retail Clerks and the Meat Cutters are each labor organizations within the meaning of Section 2(5) of the Act.

3. The appropriate units for the purposes of collective bargaining within the meaning of Section 9(b), excluding guards and supervisors as defined in the Act, consist of the following:

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[48] *Ranch-Way, Inc., supra; Valleydale Packers, Inc.,* 162 NLRB 1486.

[49] *F. W. Woolworth Company,* 90 NLRB 289; *Isis Plumbing & Heating Co.,* 138 NLRB 716.

[50] Motion is made by the Meat Cutters, in its brief, to remand these consolidated proceedings for a renewed hearing on alleged grounds that the Trial Examiner unduly restricted its participation in the trial of the cases. As evident, the interest of the Meat Cutters is limited to a unit of two employees at the Monroe store, concerning which there are "no significant issues of fact," as indeed stated in its own brief. It is unnecessary to describe all the rulings in question and the related conduct of the Meat Cutters' counsel throughout the hearing. It was and is my opinion that this attorney was litigious to an extraordinary degree, tending to hamper and prolong the proceedings, for reasons and purposes which in large part were frivolous. Furthermore, the pertinent rulings were within the sound discretion of the Trial Examiner and in no event prejudicial to the Meat Cutters. The motion is denied. See, e.g., *Spector Freight System, Inc.,* 141 NLRB 1110.

(a) All employees of Respondent Zim's at its Monroe, Wisconsin, store, excluding the store-manager, meat department employees, stock auditors, specialty men and demonstrators employed by vendors.

(b) All meat and delicatessen employees of Respondent Zim's at its Monroe, Wisconsin, store, excluding all other employees.

(c) All employees of Respondent Paul's at its Edgerton, Wisconsin, store, excluding the store manager, co-manager, meat department employees, stock auditors, specialty men and demonstrators employed by vendors.

4. Since July 27, the Retail Clerks has been and is now the exclusive representative of all employees of Respond-Zim's in the appropriate unit, described in paragraph 3(a) above, within the meaning of Section 9(a) of the Act.

5. Since July 27, the Meat Cutters has been and is now the exclusive representative of all employees of Respondent Zim's in the appropriate unit, described in paragraph 3(b) above, within the meaning of Section 9(a) of the Act.

6. Since July 26, the Retail Clerks has been and is now the exclusive representative of all employees of Respondent Paul's in the appropriate unit, described in paragraph 3(c) above, within the meaning of Section 9(a) of the Act.

7. By failing and refusing, at all times since July 27, to bargain collectively with the Retail Clerks as the exclusive representative of the employees in the applicable appropriate unit, Respondent Zim's has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

8. By failing and refusing, at all times since July 27, to bargain collectively with the Meat Cutters as the representative of the employees in the applicable appropriate unit, Respondent Zim's has engaged in and is engaging in

unfair labor practices within the meaning of Section 8(a)(5) of the Act.

9. By failing and refusing, at all times since July 26, to bargain collectively with the Retail Clerks as the exclusive representative of the employees in the applicable appropriate unit, Respondent Paul's has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

10. In mid-August, and at all times since, by unilaterally changing the wage rates and working hours of employees in the appropriate unit, described in paragraph 3(a) above, Respondent Zim's has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

11. In mid-August, and at all times since, by unilaterally changing the working hours of employees in the appropriate unit, described in paragraph 3(b) above, Respondent Zim's has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

12. By the foregoing, and by other acts and conduct, Respondent Zim's has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

13. By the foregoing, Respondent Paul's has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

14. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

15. Respondent Parkwood has not engaged in the unfair labor practices alleged in Case No. 30-CA-1715 (the Middleton store).

Upon the above findings of fact, conclusions of law, and the entire record in the consolidated cases, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER

Respondent, Zim's Foodliner, Inc., d/b/a Zim's IGA Foodliner, Monroe, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively, upon request, with the Retail Clerks as the exclusive representative of its employees in the appropriate unit described above.

(b) Refusing to bargain collectively, upon request, with the Meat Cutters as the exclusive representative of its employees in the appropriate unit described above.

(c) Unilaterally changing the wages, hours, or other terms or conditions of employment of employees in the appropriate unit described above, without bargaining in good faith with the Retail Clerks.

(d) By unilaterally changing the working hours or other terms or conditions of employment of employees of the appropriate unit described above, without bargaining in good faith with the Meat Cutters.

(e) Threatening to go out of business, or to take other reprisal, to discourage the employees' membership in, or support of, the Retail Clerks or the Meat Cutters.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain with the Retail Clerks as the exclusive representative of its employees in the appropriate unit described above, and embody in a signed agreement to any understanding reached.

(b) Upon request, bargain with the Meat Cutters as the exclusive representative of its employees in the appropriate unit described above, and embody in a signed agreement to any understanding reached.

(c) Make whole all the employees employed in the appropriate units described above for any losses they may have suffered as a result of Respondent's unilateral changes, in the manner set forth in "The Remedy" section of the Trial Examiner's Decision.

(d) Post at its store in Monroe, Wisconsin, copies of the notice attached hereto as "Appendix A." Copies of the notice on forms provided by the Regional Director for Region 30, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Trial Examiner's Decision, what steps the Respondent has taken to comply herewith.

ORDER

Respondent, S & O, Inc. d/b/a Paul's IGA Foodliner, Edgerton, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively, upon request, with the Retail Clerks as the exclusive representative of its employees in the appropriate unit described above.

(b) Post at its store in Edgerton, Wisconsin, copies of the notice attached hereto as "Appendix B."[51] Copies of said notice, on forms provided by the Regional Director for Region 30, shall, after being duly signed by Respondent be posted immediately upon receipt thereof in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notice is not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Trial Examiner's Decision, what steps Respondent has taken to comply herewith.[52]

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[51] As to the notice marked Appendix B, as well as that marked Appendix A, above,— in the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[52] As to Respondent Paul's, as well as to Respondent Zim's above, — in the event that this recommended Order is adopted by the Board, after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith."

ORDER

It is hereby recommended that the complaint in Case No. 30-CA-1715 against Respondent Parkwood at the Middleton, Wisconsin, store, be dismissed in its entirety.[53]

Further, it is recommended that the consolidated complaints be dismissed insofar as they allege violations not specifically found herein.

Dated at Washington, D.C. — June 23, 1972.

/s/ Benjamin B. Lipton
Benjamin B. Lipton
Trial Examiner

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[53] As to the recommended orders affecting each Respondent herein, — in the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

DORRANCE J. BENZCHAWEL AND TERRENCE D. SWINGEN, COPARTNERS d/b/a PARKWOOD IGA and RETAIL CLERKS UNION LOCAL NO. 1401, affiliated with RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO	Case 30-CA-1715
S & O INC., d/b/a PAUL'S IGA FOODLINER and RETAIL CLERKS UNION LOCAL NO. 1401, affiliated with the RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO	Case 30-CA-1722
ZIM'S FOODLINER INC. d/b/a ZIM'S IGA FOODLINER and RETAIL CLERKS UNION LOCAL NO. 1401 affiliated with the RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO	Case 30-CA-1696
and AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL 444, AFL-CIO	Case 30-CA-1716

201 NLRB NO. 141

NLRB DECISION AND ORDER

On June 23, 1972, Administrative Law Judge[1] Benjamin

[1] The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

B. Lipton issued the attached Decision in this proceeding.[2] Thereafter Respondents Paul's and Zim's and General Counsel filed exceptions and supporting Briefs.

Subsequently Meat Cutters filed cross-exceptions and a supporting brief and also a brief in answer to Respondents' exceptions. The Respondents then filed an answering brief to Meat Cutters cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondents, Zim's Foodliner, Inc., d/b/a Zim's IGA Foodliner, Monroe, Wisconsin, and S & O, Inc., d/b/a Paul's IGA Foodliner, Edgerton, Wisconsin, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. Feb. 16, 1973

Edward B. Miller, Chairman
John F. Fanning, Member
John A. Penello, Member
National Labor Relations Board

[SEAL]

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[2] The Administrative Law Judge subsequently issued an erratum to this Decision.

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1973 — JANUARY SESSION, 1974

No. 73-1199
ZIM'S FOODLINER, INC., d/b/a ZIM'S IGA FOODLINER, and S&O, INC., d/b/a PAUL'S IGA FOODLINER,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition to Review and Set Aside a Decision and Order of the National Labor Relations Board and Cross-Application for Enforcement.

ARGUED JANUARY 16, 1974 — DECIDED APRIL 4, 1974

Before HASTINGS, *Senior Circuit Judge,* PELL and SPRECHER, *Circuit Judges.*

HASTINGS, *Senior Circuit Judge.* The principal question presented by this case is whether fragmentation of a collective bargaining unit, caused by the piecemeal sale of business assets, precludes the National Labor Relations Board from finding "successorship" and imposing attendant labor obligations upon the successor employer.

Two employers are involved in the instant petition for review. Petitioner Zim's Foodliner, Inc. (hereinafter "Zim's") was found by the Board to have violated § 8(a)(5) of the National Labor Relations Act, Title 29 U.S.C. § 158(a)(5), by refusing to bargain with two unions representing appropriate units of its employees, and by unilaterally changing certain terms and conditions of employment. Zim's also was found to have violated § 8(a)(1) of the Act, Title 29 U.S.C. § 158(a)(1), by engaging in the above § 8(a)(5) violations and by threatening to go out of business in order to discourage employee support for the unions. Petitioner S&O, Inc., doing business as Paul's IGA Foodliner (hereinafter "Paul's"),

was found to have violated §§ 8(a)(5) and 8(a)(1) through its refusal to bargain with a single union representative of its employees. Paul's was not found to have instituted unilateral changes or committed independent § 8(a)(1) violations.

Since the underlying facts were quite similar as to each employer, the complaints against both petitioners were consolidated for hearing before an administrative law judge, and a single decision issued. The judge's findings, conclusions and recommended order were subsequently adopted by the Board. The Board order, 201 NLRB No. 141 (1973), is the present subject of review. The Board here cross-petitions for enforcement of its order.

In the summer of 1971, the Kroger Company, a manufacturer, distributor and retailer of food products, undertook to terminate its retail operations in the State of Wisconsin. Pursuant to this undertaking, buyers were sought for its 57 retail outlets in the state.

On July 19, 1971, Kroger executed sales agreements covering two of its Wisconsin supermarkets. The Kroger store in the city of Monroe was purchased by Lowell Zimmer, and the store in Edgerton was purchased jointly by Paul Sanderson and Fred Oreel. Both Monroe and Edgerton are located in the general vicinity of Madison, Wisconsin, and each has a population of less than 10,000. Both businesses were subsequently incorporated by their new owners. The agreements provided for the sale of certain tangible personal property at each store, primarily inventories and equipment, and for the assignment of Kroger's leasehold interests in the store buildings. The purchasers did not agree to buy Kroger good will or other intangibles, and did not generally assume Kroger liabilities. In particular, the agreements contained no provisions for the buyers' assumption of outstanding labor agreements.[1]

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[1] The record indicates that at least one purchaser — Zimmer — strongly rejected a Kroger proposal during the negotiations that he agree to adopt existing labor contracts.

On July 24, Kroger ceased all operations at the two stores, and on July 26, bills of sale and lease assignments were executed in fulfillment of the July 19 agreements. Both the Monroe and Edgerton stores were opened for business by their new owners on July 27 under the names "Zim's IGA Foodliner" and "Paul's IGA Foodliner," respectively.

The record reveals little regarding the labor relations history of the two stores while operated by Kroger. It appears that for some years prior to 1971 Kroger maintained a bargaining relationship with two unions representing multi-store units which included the Monroe and Edgerton stores. These unions were Retail Clerks Union Local No. 1401 (hereinafter "Retail Clerks") and Amalgamated Meat Cutters & Butcher Workmen of North America Local No. 444 (hereinafter "Meat Cutters").[2] At the

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[2] Both petitioners admitted in their answers to the complaints that collective agreements covering employees in appropriate multi-store units which included their respective stores had been negotiated "for a number of years prior to * * * July 24, 1971." The minimal evidence introduced at the hearing on the point related only to the Retail Clerks, and consisted of the following testimony by a union official:

> Q. By what process was Local 1401 recognized as the collective bargaining representative of the employees in [the Edgerton] store?
>
> A. That store has been organized for a number of years before my time and also at a time in history when there was a Retail Clerks Union Local 1139 in Janesville which covered the Edgerton store. Approximately January 1st, 1963, the Janesville Local 1139 merged with Madison Local 1401.
>
> Q. And Local 1401 has represented the employees in this store since that time?
>
> A. Yes.
>
> * * *
>
> Q. By what process was Local 1401 recognized with regard to [the Monroe] store?
>
> A. In the same process as previously stated on the Edgerton store.

time of the 1971 sales, two collective bargaining agreements of relevance here were in effect. The first contract, executed November 17, 1970, and effective until June 30, 1973, was negotiated with the Retail Clerks and covered employees other than meat department and supervisory personnel at both stores. Employees at nine other Kroger stores in the Madison area were covered by this same agreement, bringing the total number of stores included in the bargaining unit to 11. A second contract, covering meat and delicatessen employees at the Monroe store, was negotiated with the Meat Cutters and executed by the parties on May 4, 1971. Four other stores were covered by this contract, which was to be effective through March 24, 1973. The record does not reveal the total number of employees in either multi-store unit.

Both the Retail Clerks and Meat Cutters agreements contained union security clauses providing for union shops. The record indicates, and the administrative law judge so found, that Zimmer, Sanderson and Oreel were all aware of these contracts at the time they purchased the former Kroger stores.

Immediately prior to the July 1971 sales, 16 employees of the Monroe store and 14 employees of the Edgerton store were covered by the Retail Clerks agreement. The Meat Cutters contract applied to three meat department employees of the Monroe store.

Following Kroger's closedown on July 24, a two day hiatus occurred during which the new owners cleaned and restocked their stores for opening. By the time Zim's opened for business on the 27th, the entire former Kroger complement of employees had been hired, *i.e.*, 16 grocery employees and 3 meat department personnel. In addition, the Kroger store manager was retained in his former position. Paul's, on the other hand, hired only 9 of the 14 former Kroger grocery employees at the Edgerton store. With the exception of part-time helpers in the form of Sanderson's wife, son and daughter, however, these 9

comprised the entire employee complement at Paul's outside of the meat department.[3] Like Zim's, Paul's continued to employ the former Kroger store manager.

On July 23, 1971, the Retail Clerks mailed letters to Zimmer and Oreel, informing them of "successor language" in the Kroger collective bargaining agreement and demanding that the agreement be honored. The letters advised that "[t]he successor employer * * * may not unilaterally change wages, hours, [or] working conditions without committing an unfair labor practice and subjecting itself to a back pay order." The letters concluded by stating that if any "special circumstances" existed of which the union was not aware, it was willing to meet with the purchasers and discuss them. Sanderson received a similar letter on July 28.

On August 20, 1971, the Meat Cutters mailed a letter to Zimmer advising him of his obligation to recognize and bargain with the union with respect to Zim's meat department employes, as well as to "honor, adopt and enforce" the Kroger collective bargaining agreement.

Zim's refused to recognize and bargain with either union; Paul's adopted the same position with respect to the Retail Clerks. Likewise, both employers refused to adopt or be bound by the Kroger collective bargaining agreements.

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[3] The administrative law judge noted that employee members of the immediate families of the new owners would not properly be included in the new units. See 29 U.S.C. § 152(3). This determination is not entirely free from doubt. See *NLRB* v. *Caravelle Wood Products, Inc.*, 7 Cir. 466 F.2d 675 (1972). Statements herein to the effect that the alleged successors hired their entire employee complements from among former Kroger employees are subject to this possible qualification with regard to Paul's. We need not resolve the question in order to decide the successorship issue here presented, since the result would be the same in either event.

The parties stipulated that Paul's, on July 27, unilaterally reduced wage rates and work hours below those provided by the Kroger-Retail Clerks agreement. On that date Paul's informed its employees of their wages and working hours and subsequently maintained those wages and hours at their announced levels.

As for Zim's' alleged unilateral changes, the parties stipulated that in mid-August, "about three weeks after the opening for business on July 27, 1971," the employer unilaterally reduced wage rates of grocery department employees, and reduced work hours of both grocery and meat department employees, below the levels specified by the Kroger agreements. During the three week period, Zim's had continued the wages and hours in effect under Kroger. Zim's subsequently maintained the new wages and hours established in mid-August.

Unfair labor practice charges against Zim's were filed by the Retail Clerks and the Meat Cutters on August 27 and September 16, 1971, respectively. Each charge alleged that Zim's had refused to recognize the union as collective bargaining representative of its employees; had unilaterally changed terms and conditions of employment without bargaining; and had refused to abide by the terms of the Kroger collective bargaining agreement.[4] On September 22, 1971, the Retail Clerks filed a charge against Sanderson with respect to Paul's, which was subsequently amended on November 24, 1971, to allege violations similar to those attributed to Zim's. The Acting Regional Director issued complaints against both employers. The cases were consolidated for hearing on January 18 and 19, 1972, along

[4] At the time of the charges, Board law held that a successor's refusal to abide by the predecessor's collective bargaining agreement was an unfair labor practice. *William J. Burns International Detective Agency, Inc.*, 182 NLRB 348 (1970), enforcement refused on this issue, 441 F.2d 911 (2 Cir. 1971), aff'd *sub nom. NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

with a third case arising out of the sale of the Kroger supermarket in Middleton, Wisconsin.

As to the latter store, the administrative law judge found that the union majority was dissipated as a result of the transfer, and accordingly dismissed the complaint. As to Zim's and Paul's, however, the judge found that the units of grocery and meat employees at the respective stores were appropriate for collective bargaining,[5] and that the new owners stood "as the legal successors to Kroger." He thus concluded that petitioners were guilty of the unfair labor practices hereinabove set forth.[6] The judge's decision recommended the usual remedies, including an order that Zim's and Paul's bargain with the unions and that Zim's make whole its employees for any losses caused by its unilateral changes in wages and hours. Backpay and interest were to be computed according to established Board formulae. As noted above, the Board adopted in their entirety the findings, conclusions and recommended order of the administrative law judge.

Petitioners' basic contention here is succinctly stated in their brief:

> Petitioners submit that, for them to be found successors, a majority of their employees at each store must

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[5] Petitioners had admitted the appropriateness of the single store units in their answers to the complaints.

[6] The intervening *Burns* Supreme Court decision compelled the judge to reject General Counsel's contention that the successor employers were bound by the Kroger collective bargaining agreements. As to Paul's' alleged unilateral changes, the judge found that the employer had "commenced operation * * * by instituting wage rates and working hours which were less than those provided in the contract under Kroger." From this the judge concluded that Paul's "cannot be held to have made unlawful unilateral changes when it had no 'previous relationship whatsoever to the bargaining unit' " (quoting *Burns*, 406 U.S. at 294).

have been a majority of predecessor Kroger's employees in the entire multi-store units.

In addition, petitioners argue that the change of employers from a "hierarchical corporation" — Kroger — to small, independent operations owned and managed locally, has essentially changed the nature of the employing industry and has thereby precluded successorship. The Board, on the other hand, contends that a rebuttable presumption of continued majority support for an established bargaining representative applies to, and is not rebutted by, an ownership change such as occurred here. The result, says the Board, is that Zim's and Paul's are successor employers and are required to bargain with unions which previously represented a majority of their employees.

I.

Before proceeding to the successorship issues, we initially confront Zim's' contention that the Board's finding of certain independent § 8(a)(1) violations is unsupported by law or substantial evidence. The consequences of such finding are limited in this case to a cease and desist order and the inclusion of appropriate repentant language in the notice to employees.

The administrative law judge found that on or about August 23, 1971, Lowell Zimmer separately told three grocery employees that he could not afford to pay the wages provided in the Retail Clerks' contract and would go out of business if the employees voted for the Retail Clerks as their bargaining representative. While the reported conversations varied as to each employee, our review of the record indicates that the judge's conclusion regarding the import of the conversations is supported by sub-

stantial, and indeed uncontradicted, evidence on the record as a whole.[7]

Zim's argues, however, that the statements were "legitimate economic predictions" and as such are protected by § 8(c) of the Act.[8] Such claim is more than merely colorable, since the statements in context seem to indicate a good faith concern about high labor costs and an inability to compete. It is undisputed that Zimmer shortly thereafter did in fact reduce wages substantially.

Nevertheless, Zim's' argument overlooks the severe burden which has been placed upon employers seeking to justify such statements by *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575 (1969):

> "* * * [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat

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[7] Employee John Gordon testified that Zimmer "said that he wasn't making any money"; that "he talked as if we were going to vote on the Union"; and that "he said I can't tell you how to vote, 'yes' or 'no' for the Union, but if the Union does get in that he wouldn't be able to afford to pay up to Union standards, that he would be bankrupt * * *." Mary Ann Goecks testified that Zimmer told her that "he could no longer work with Union wages * * *"; that the employees "would at some time possibly be asked to revote in the Union"; and that "if you do vote it in, if the Union comes in, I would have to close the doors * * *." Finally, Raymond Fiala testified that Zimmer told him that "he didn't think that he could pay the Union scale," and that "if the Union would stay * * * he is afraid that he would have to close the store and we would probably be all out of jobs."

[8] "(c) The expressing of any views, argument, or opinion * * * shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

> of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. * * * We therefore agree with the court below that '[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof.' 397 F.2d 157, 160. * * *" 395 U.S. at 618-619.

Gissel recognizes that employer predictions of closedown upon unionization are inherently fraught with overtones of reprisal. Furthermore, "a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship." 395 U.S. at 620. The burden has been placed upon the employer to justify such statements by objective evidence. *NLRB* v. *Sinclair Co.*, 1 Cir., 397 F.2d 157, 161 (1968), aff'd *sub nom. NLRB* v. *Gissel Packing Co., supra; Mon River Towing, Inc.* v. *NLRB*, 3 Cir., 421 F.2d 1, 11 (1969). Since Zim's made no attempt to meet this burden before the Board, we conclude that its finding of a § 8(a)(1) violation is supported by substantial evidence. *NLRB* v. *Lenkurt Electric Co.*, 9 Cir., 438 F.2d 1102 (1971), relied upon by Zim's, is not *contra* since there the record affirmatively indicated an objective basis in fact for the employer's statements. 438 F.2d at 1108. Compare also, *NLRB* v. *River Togs, Inc.*, 2 Cir., 382 F.2d 198 (1967).

Finally, the fact that the statements were made in the context of a successorship dispute, rather than during an active union organizational campaign, does not relieve the

employer of liability. *NLRB* v. *Polytech, Inc.*, 8 Cir., 469 F.2d 1226, 1231 (1972); *cf. Mon River Towing, Inc., supra*, at p. 11.

II.

Our starting point on the successorship question is *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972). In *Burns*, the Supreme Court approved a Board bargaining order against a successor employer where 27 of the 42 employees in the successor's starting work force had been employed by the predecessor and where the predecessor employees had been represented by a recently certified union. The Court concluded that "[i]n these circumstances, it was not unreasonable for the Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees and that Burns could not reasonably have entertained a good-faith doubt about that fact." *Id.* at 278. This was true even though, as the dissenters point out, it was "by no means mathematically demonstrable that the union was the choice of a majority of the 42" successor employees.[9] *Id.* at 297. Predictably, there was no indication in the *Burns* record that all 27 former employees of the predecessor had voted for the union in the recent certification election, or that any of the 15 new employees favored such representation.

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[9] This mathematical unertainty was not, however, the principal basis for the *Burns* dissent. Rather, the four dissenters primarily argued that the absence of any transfer of assets between the predecessor and Burns should preclude successorship. Where a transfer of assets accompanies the hiring of predecessor employees, as in the present case, the dissenters went beyond the majority to indicate that the successor might be required to perform the predecessor's collective bargaining contract. 406 U.S. at 305 (Rehnquist, J.).

Burns thus recognizes that in at least some circumstances, the democratic principle embodied in § 9 of the National Labor Relations Act is not offended by procedures which leave some doubt as to the actual, immediate desires of employees with regard to representation. On a previous occasion the Supreme Court held that even clear and undisputed evidence that a majority of employees do not desire a particular bargaining representative may not suffice to upset Board procedures designed to promote stability in the bargaining relationship. *Brooks* v. *NLRB*, 348 U.S. 96 (1954).[10] Decisions both in this circuit and elsewhere have recognized this occasional tension between democracy and stability in the labor relations area, and have granted the Board some measure of discretion in achieving a fair balance. *NLRB* v. *Montgomery Ward & Co.*, 7 Cir., 399 F.2d 409, 412 (1968); *NLRB* v. *Frick Co.*, 3 Cir., 423 F.2d 1327, 1332 (1970).

Three factors distinguish our present situation from that in *Burns*. First, the successor in *Burns* began operations within the one-year period during which the prior certification created an "irrebuttable" presumption of continuing union majority. Here, the record does not reveal whether either union was ever formally certified, and it is undisputed that such certification, if any, occurred "a number of years" prior to the successor's takeover. Second, no issue was raised in *Burns* concerning changes in the nature of the employer. Both predecessor and successor apparently operated on a large scale. Here, petitioners strenuously argue that the change from large to small corporate employers is

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[10] In *Brooks*, the Court approved as within the administrative authority a Board rule requiring that a certification be honored for a period of one year, absent unusual circumstances. In dicta, the Court indicated that the Board's establishment of a rebuttable presumption of continuing union majority after the one-year period had expired was likewise within the agency's authority under the Act. 348 U.S. at 104.

of controlling significance. Third, the bargaining units in *Burns* were identically defined and of roughly equal size both before and after the employer change. Both units consisted of plant guards employed to fulfill a service contract covering a single plant. The units at Zim's and Paul's, in contrast to the multi-store predecessor units, consisted of employee groups at single stores.

Since *Burns* leaves unresolved these several problems raised by the peculiar facts of this case, we turn to the substantial body of relevant law developed by the Board and the Courts of Appeal.

It is well established that a Board certification creates an almost conclusive presumption of continued majority status for a reasonable period of time, usually one year. Thereafter, there exists a rebuttable presumption of majority representation. *Brooks* v. *NLRB, supra; NLRB* v. *Burns International Security Services, Inc., supra,* n.3 at p. 279. Board orders based on such rebuttable presumption have been enforced on numerous occasions by the Courts of Appeal, including our own. See, *e.g., NLRB* v. *John S. Swift Co.,* 7 Cir., 302 F.2d 342 (1962); *Bally Case & Cooler, Inc.* v. *NLRB,* 6 Cir., 416 F.2d 902 (1969), *cert. denied,* 399 U.S. 910 (1970); *Terrell Machine Co.* v. *NLRB,* 4 Cir., 427 F.2d 1088, *cert. denied,* 398 U.S. 929 (1970); *NLRB* v. *Tesoro Petroleum Corp.,* 9 Cir., 431 F.2d 95 (1970). Furthermore, it is now recognized that the bargaining relationship need not be established by formal certification in order for the presumption to apply. *NLRB* v. *Denham,* 9 Cir., 469 F.2d 239 (1972), vacated on other grounds, 411 U.S. 945 (1973); *NLRB* v. *Frick Co.,* 3 Cir., 423 F.2d 1327 (1970); *NLRB* v. *Master Touch Dental Laboratories, Inc.,* 2 Cir., 405 F.2d 80 (1968). In *Denham, supra,* the court applied *Burns* and enforced a Board bargaining order against a successor where the union had been recognized on the basis of a card check almost 30 years prior to the ownership change, 469 F.2d at 244. See also, *NLRB* v. *Bachrodt Chevrolet Co.,* 7 Cir., 468 F.2d 963, 968 (1972), vacated on other grounds, 411 U.S. 912 (1973).

The rebuttable presumption does not prevent the employer from petitioning the Board for a new election. *NLRB* v. *Laystrom Manufacturing Co.*, 7 Cir., 359 F.2d 799 (1966); *NLRB* v. *Auto Ventshade, Inc.*, 5 Cir., 276 F.2d 303 (1960). Nor does it affect the employees' statutory right to seek a decertification election upon the requisite showing of substantial interest. See 29 U.S.C. § 159(c)(1)(A)(ii). The effect of the presumption is merely to require the employer to bargain with the previously recognized representative unless it can show (1) that the union in fact has lost its majority, or (2) at the least, that reasonable grounds exist for good faith doubt as to continuing majority support for the representative. *Celanese Corp.*, 95 NLRB 664 (1951); *Terrell Machine Co.* v. *NLRB, supra.*

Since some risk is involved in a refusal to bargain, the Board has stated that the better practice is for the employer to continue to bargain while petitioning for a new election. *United States Gypsum Co.*, 90 NLRB 964, 966 (1950). In a successorship case, where grounds for good faith doubt were lacking, the Fifth Circuit observed that "[t]he employer's proper course is to recognize the prima facie union representation of the employees and to continue to deal with the union, but to petition the Board for a new election." *NLRB* v. *Auto Ventshade, Inc., supra,* at p. 307. This may conflict with the Board's subsequent position that some objective grounds for doubting the union's majority also must be shown in order to raise a § 9(c) "question of representation." *United States Gypsum Co.*, 157 NLRB 652 and 161 NLRB 601 (1966). In either event, however, the burden imposed upon employers or employees by Board policy in this area is hardly severe.

Where the Board invokes successorship to impose a bargaining obligation upon a party with no previous relations with the union, it has determined, in effect, that the fact of ownership change does not vitiate the otherwise applicable presumptions of continuing majority. This is made clear

by decisions which treat good faith doubt regarding majority status as a defense to the imposition of successorship obligations. See *Burns* at p. 278, quoted *supra; Tom-A-Hawk Transit, Inc.* v. *NLRB,* 7 Cir., 419 F.2d 1025, 1028 (1969); *NLRB* v. *Interstate 65 Corp.,* 6 Cir., 453 F.2d 269, 275 (1971); *NLRB* v. *Valleydale Packers, Inc.,* 5 Cir., 402 F.2d 768, 769 (1968), *cert. denied,* 396 U.S. 825 (1969). In the present case, the administrative law judge specifically found that petitioners did not base their refusals to bargain on good faith doubt. Setting aside the question whether diminution in unit size or changes in the corporate structure of the employer *per se* should be regarded as justifying such doubts, this finding is not disputed here and is, in fact, well supported by the record.

The Board has held that even informal employee statements to the employer regarding employee sentiment may provide a basis for good faith doubt. *Wallace Co.,* 174 NLRB 416 (1969). Evidence that the employees were represented by a different union prior to their recent inclusion in a multi-store unit, or that other unions are demanding recognition, may also support such doubt. *Cf. NLRB* v. *Downtown Bakery Corp.,* 6 Cir., 330 F.2d 921 (1964). Nothing comparable was presented here. Indeed, Zimmer's various attempts to convince his employees to oppose the union might support an inference that he, at least, believed that employee sentiment was pro-union.

As to the problems of unit size and corporate structure, it matters not whether we analyze them in terms of *per se* doubts regarding union majority, or in terms of their effect upon continuity in the employing industry, the traditional determinant of successorship. See *NLRB* v. *Colten,* 6 Cir., 105 F.2d 179 (1939). In either case, the applicable policies are those set forth in *Brooks, supra:* (1) the employees right to select their bargaining representative, (2) the promotion of stable bargaining relationships, and (3) a "due regard to administrative prudence." 348 U.S. at 103.

Over the years, the most important element in a successorship determination has been the employee complement of the purported successor. See Goldberg, The Labor Law Obligations of a Successor Employer, 63 Nw. U.L. Rev. 735, 793-799 (1969).[11] Here, all of the employees in the new units were previously employed by the unionized predecessor, and at the same locations. In this respect, the Board's case is even stronger than in *Burns*.

There is, however, some authority for petitioners' contention that a change in the size and operational methods of the employer is also a relevant consideration. See *International Association of Machinists* v. *NLRB*, D.C. Cir., 414 F.2d 1135, *cert. denied*, 396 U.S. 889 (1969); *NLRB* v. *Alamo White Truck Service, Inc.*, 5 Cir., 273 F.2d 238 (1959); *Atlantic Technical Services Corp.*, 202 NLRB No. 13 (1973); *B&E Supermart*, 195 NLRB 349 (1972). Substantial changes in the employing industry may be expected to alter employee expectations and needs, thereby changing employee sentiment with respect to representation. *NLRB* v. *Armato*, 7 Cir., 199 F.2d 800, 803 (1952).

The administrative law judge heard considerable testimony respecting the changes instituted by Zim's and Paul's subsequent to their takeover of the former Kroger stores. He concluded that:

> "Kroger and each Respondent operated at the same location, with substantially the same physical plant and equipment; both sought and served the same customers with the same type of products; and the

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[11] "Of fifty-nine cases decided by the Board in the past twenty years in which the question of successorship for bargaining purposes was presented, in fifty-one the alleged successor had a work force composed of a majority of employees who had worked for a unionized predecessor. In all but four of these the Board found the new employer to be a successor for bargaining purposes." 63 Nw. U.L. Rev. at p. 794.

> employees of both had the same primary job functions, immediate supervision, and working conditions, with only minor modifications. While each Respondent's control of the enterprise and the employees is more localized, this difference is not of such magnitude as to be given controlling effect. *Vis-a-vis* the employees in light of their statutory bargaining rights, it cannot be held that the nature of the employing industry in each case — that of a retail grocery supermarket — has basically changed." [Footnotes omitted.]

The changes relied on by the employers here are similar to those found insufficient to defeat successorship in *NLRB* v. *Zayre Corp.*, 5 Cir., 424 F.2d 1159 (1970), and in *NLRB* v. *Interstate 65 Corp., supra.* It is apparent that the administrative law judge considered petitioners' contentions but concluded that the changes accompanying this business transfer were not such as to significantly affect employee attitudes. Since such determination is primarily factual and is here supported by substantial evidence, we see no reason to disturb it.

Petitioners also argue that the change here in unit size and definition should bar successorship. Such change, like the change in the size of the employer, permits the possibility that a minority or even none of the employees as Zim's and Paul's may now support the unions.

As exemplified by *Burns,* however, the courts and the Board have imposed the bargaining obligation in situations where mathematics alone might indicate a reasonable basis for doubting continued majority. Numerous cases hold that employee turnover, standing alone, does not give rise to good faith doubts regarding a union's majority status. See, *e.g., NLRB* v. *Bachrodt Chevrolet Co., supra,* at p. 968; *NLRB* v. *John S. Swift Co., supra,* at p. 345; *NLRB* v. *Little Rock Downtowner, Inc.,* 8 Cir., 414 F.2d 1084, 1091 (1969). Likewise, mere diminution in the

employee complement of the bargaining unit does not relieve the successor of his duty to bargain. *Rohlik, Inc.*, 145 NLRB 1236 (1964) (successor's work force one-third as large as predecessor's); *Western Freight Association*, 172 NLRB 303 (1968) (work force reduced from 500 to 110); *Royal Brand Cutlery Co.*, 122 NLRB 902 (1959) (work force reduced from 296 to 134). Indeed, this court has enforced a Board bargaining order where the successor retained only 8 of its predecessor's 25 employees. *NLRB* v. *Armato*, 7 Cir., 199 F.2d 800 (1952). We there held:

> "While the work force was considerably reduced, that factor standing alone did not justify the refusal to bargain. Those employees of [the successor] in the unit defined in the certification were all former [predecessor] employees and members of the union. The fact that they found themselves fewer in number than before warrants no implication that they no longer desired the union to represent them. * * *" 199 F.2d at 803.

Armato is dispositive of petitioners' contention that, in order to be held a successor, an employer cannot have hired less than a majority of the employees in the predecessor unit. The case holds, in effect, that the Board may treat a much-reduced bargaining unit as a miniature of the former unit.

Once it is determined that the successor unit is appropriate for bargaining, a change in unit definition, from large to smaller units, would seem not to raise any additional considerations beyond those disposed of in *Armato*.[12] We therefore do not believe that the Board

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[12] A change from a smaller to a larger unit raises more difficult problems due to the inclusion in the successor's work force of employees not previously represented by the union. Even *in* such a situation, however, a divided Board has recently held that the unit change was not controlling. *Spruce Up Corp.*, 209 NLRB No. 19 (1974), 42 U.S.L.W. 2482.

may be faulted for imposing the same obligation to bargain in the present situation. *Cf. NLRB* v. *Geronimo Service Co.*, 10 Cir., 467 F.2d 902 (1972). There is here no dispute regarding the appropriateness of the new units. Compare *Burns, supra,* 406 U.S. at 297-298 (dissenting opinion); *Emerald Maintenance, Inc.* v. *NLRB,* 5 Cir., 464 F.2d 698, 702 (1972). Nor is there any evidence that the employees of the single stores were originally brought within the multi-store unit by accretion, as in *Atlantic Technical Services Corp.,* 202 NLRB No. 13 (1973). The record positively indicates that the grocery employees, at least, were already represented by the Retail Clerks prior to the merger of union locals which gave rise to the 11 store predecessor unit. See note 2, *supra.* Finally, the Board's action here is consistent with its previous treatment of a multi-store predecessor unit in the retail food industry. See *Avenue Meat Center,* 184 NLRB No. 94 (1970).

Petitioners rely upon several Board cases, *viz.: Atlantic Technical Services Corp., supra; American Concrete Pipe of Hawaii, Inc.,* 128 NLRB 720 (1960); *B&E Supermart,* 195 NLRB 349 (1972); and *Thomas Cadillac, Inc.,* 170 NLRB 884 (1968), enf'd *sub nom. International Association of Machinists* v. *NLRB, supra.* We have considered these cases but are not persuaded that they dictate a contrary result.

We accept as true, as we must on the record before us, that no election has ever been held to directly determine the desires of the employees in the presently defined units. Nevertheless, the unavoidable fact is that the new units were composed entirely of former Kroger employees who had been represented for a considerable period of time by these unions, and that petitioners offered no evidence to indicate that such representation was no longer desired by the employees of these particular stores. Under these circumstances the Board acted within its authority in ordering petitioners to bargain.

We hold, therefore, that the change in unit size here presented does not *per se* relieve petitioners of their duty to bargain. The Board has balanced the competing considerations involved by requiring an employer who succeeds to a portion of a multi-store bargaining unit and who does not choose to bargain with the existing union to show, at the least, some objective basis for doubting the union's continued representative status. Such requirement accords with the realities of the situation, is true to the policies of the Act, and is an appropriate exercise of Board authority.

III.

We recently held in *NLRB* v. *Bachrodt Chevrolet Co.*, 7 Cir., 468 F.2d 963 (1972), that a successor employer which unilaterally changes terms and conditions of employment after its bargaining obligation has matured commits an unfair labor practice.

The *Bachrodt* decision was subsequently vacated by the Supreme Court and remanded to the Board for further proceedings in light of *Burns*. 411 U.S. 912 (1973). Although our decision in *Bachrodt* was rendered after *Burns*, the Board order which it enforced predated *Burns*. In its brief remand order, the Supreme Court cited two cases which require that review of an administrative agency decision be limited to the grounds upon which the agency itself purported to act. *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 245-250 (1972); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943). On the unilateral changes question, our *Bachrodt* decision relied in part on a concept propounded in dicta in *Burns* which the Board had not previously considered.[13]

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[13] The Supreme Court also vacated and remanded *NLRB* v. *Denham, supra,* on identical grounds. 411 U.S. 945 (1973). Like *Bachrodt, Denham* had relied on the *Burns* dicta in upholding the unilateral changes portion of the Board's order. See 469 F.2d at 246-247.

The original *Bachrodt* decision was reaffirmed by the Board on remand, 205 NLRB No. 122 (1973), and is now pending here upon the Board's application for enforcement.[14] The Board's supplemental decision adopted the reasoning of the Supreme Court as interpreted and applied by the majority in *Bachrodt.*

Although it would appear that the Supreme Court's action in *Bachrodt* was based purely on institutional considerations, we need not pre-judge that case in order to resolve the present controversy. The point of contention in *Bachrodt,* as emphasized by Judge Stevens' dissenting opinion, concerned whether the successor was bound by the predecessor's terms where the successor announced changes on the first day he owned the business. 468 F.2d at 970-972. The majority felt that no changes could be unilaterally instituted subsequent to the formation of the new owner's intention to hire the predecessor employees, which occurred three days prior to the changeover. *Id.* at 969.

Here, in contrast, petitioner Zim's did not institute the challenged wage and hour reductions until some three weeks after its July 27 takeover of the Monroe store. The terms which were changed, while identical to those previously binding on Kroger, had been voluntarily assumed by Zim's as its own initial terms of employment. Paul's, in contrast, instituted its changes simultaneously with takeover and accordingly was found by the Board to have acted lawfully. See note 6, *supra.*

To thus distinguish between Zim's and Paul's on the basis of the timing of wage and hour reductions is not contrary to the teachings of *Burns.* There, the Court held that in the interest of promoting business transfers, a successor may not be compelled to adopt the terms of its predecessor's labor contract. Commenting on the Board's

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[14] No. 73-2032, filed Nov. 16, 1973.

alternative theory of unilateral changes, the Court stated, in pertinent part:

> "* * * It is difficult to understand how Burns could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to [the date of takeover], no outstanding terms and conditions of employment from which a change could be inferred. The terms on which Burns hired employees for service after [the date of takeover] may have differed from the terms extended by [the predecessor] and required by the collective-bargaining contract, but it does not follow that Burns changed *its* terms and conditions of employment when it specified the initial basis on which employees were hired * * *.
>
> "* * * [T]here is no evidence that Burns ever unilaterally changed the terms and conditions of employment it had offered to potential employees * * * after its obligation to bargain with the union became apparent. * * *" 406 U.S. at 294-295 (emphasis by the Court).

This language indicates to us that the Court did not intend to preclude application of the unilateral changes doctrine to employers who voluntarily adopt pre-existing terms and conditions, but who subsequently have second thoughts in the matter. Perhaps a line need be drawn somewhere, although *Bachrodt,* if still good law in this respect, would indicate that the period necessary to establish voluntary adoption is quite brief. In any event, the present three-week period is clearly sufficient in this regard. Accordingly, the Board's finding of unlawful unilateral changes by Zim's will be enforced. *NLRB* v. *Katz,* 369 U.S. 736 (1962); *NLRB* v. *Bachrodt Chevrolet Co., supra.*

IV.

The administrative law judge recommended that Zim's make whole its employees for losses caused by unlawful unilateral changes and observed that backpay and interest shall be computed "under the established formulae of the Board." Such recommendation was adopted by the Board.

Zim's argues that a back pay award cannot be justified. In support thereof, it claims that its sales during the first two months of operation ranged from $18,000 to $23,000 weekly, as compared with a weekly Kroger average of $35,000; that the full Kroger employee complement was retained throughout this period despite the reduction in sales; and that had it not reduced wages and hours when it did, it would have been forced to lay off employees. Accordingly, it is argued, the wage and hour reductions were economically required and represented, in effect, the lesser of two evils.

Since wage reductions were relatively substantial, *i.e.*, 87 cents — 93 cents per hour, per employee, Zim's estimates that an award of full back pay would exceed $50,000 in amount.

In view of the wide discretion granted the Board in formulating remedies under the Act, we cannot say that *no* back pay award is proper under these circumstances. *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533 (1943). Beyond this, the issues are not ripe for determination. "It is the ordinary practice of the Board not to consider the amount of back pay until its general remedial order has been enforced by the court on its merits * * *." *NLRB* v. *Nickey Chevrolet Sales, Inc.*, 7 Cir. ... F.2d ... (slip opinion, Feb. 27, 1974, at p. 3). See also, *Nathanson* v. *NLRB*, 344 U.S. 25, 29-30 (1952). The Board concedes in its brief that Zim's' contention here may be raised in post-decree compliance proceedings.

We merely note that Zim's' estimate of back pay liability in excess of $50,000 overlooks the Board's own policy of seeking "to bring about, in unfair labor practice cases, 'a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.'" *F. W. Woolworth Co.*, 90 NLRB 289, 292 (1950), citing *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941). As we emphasized in *Bachrodt*, the successor's duty goes no further than the obligation to bargain with the union until impasse is reached. 468 F.2d at 970. Thereafter, he is free to unilaterally alter terms and conditions as he sees fit, constrained only by his relative economic power *vis-a-vis* the union. The economic factors here put forward by Zim's, if substantiated, will be relevant to the question of what actual harm was suffered by Zim's' employees as a result of Zim's' refusal to bargain. *Cf. NLRB* v. *Mastro Plastics Corp.*, 2 Cir., 354 F.2d 170 (1965), *cert. denied*, 384 U.S. 972 (1966); *Salmon & Cowin, Inc.* v. *NLRB*, 5 Cir., 148 F.2d 941, *cert. denied*, 326 U.S. 758 (1945).

REVIEW DENIED.
ENFORCEMENT GRANTED.

PELL, *Circuit Judge*, dissenting.

Judge Hastings, in writing the majority opinion, has addressed the issues in a scholarly, tightly-reasoned fashion. However, it appears to me, notwithstanding the persuasiveness of the opinion, that it extends the law of successorship in the federal labor law area beyond proper limits. I therefore respectfully dissent.

Because of the drastic differences between the operational structures and practices of Kroger, on the one hand, and the sole proprietorship, non-chain grocery stores, on the other, the "wholly different case" adverted to in *NLRB* v. *Burns Int'l Security Services*, 406 U.S. 272, 280 (1972),

is presented here. Clearly, the Kroger bargaining unit of 11 stores was no longer an appropriate unit.

While the administrative law judge did not find all of the differences of major consequence, we need look only at his decision to be aware of the vast scope of the changes subsequent to the purchase from Kroger. Each store was converted from a division of a nationwide supermarket chain to an individually owned and operated store. Kroger's merchandising, pricing, promotion, traffic and the like were centrally controlled. Kroger store managers had extremely limited discretion as they were required to adhere to Kroger's established programs. After the sale, basically, all decisions were made by the store owners or managers.[1] All personnel matters are handled by the new owners on the local scene. In Kroger's system, the wages, hours, and conditions of employees were essentially fixed in the master union contracts, in which no store was individually treated.[2] Hiring, discharge, and disciplinary matters, while formerly conducted at the store level, were submitted by recommendation to Kroger's personnel department for final approval or disapproval.

Other differences noted by the administrative law judge but apparently given little weight by him were as follows:

> "Respondents operate a friendlier store; spend less money than Kroger for advertising; purchase and

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[1] The administrative law judge did find some external control in the contracts of the new owners with Gateway/IGA. Gateway Foods, Inc. was a wholesale distributor and the stores would participate in cooperative programs of the Independent Grocers Alliance. Comparability between this loose relationship and the tight control exercised by Kroger is not supported by the record and, I note, it apparently plays no part in the majority decision of this court.

[2] The Retail Clerks Union contract did separately deal with the cities covered by the contract in the wage schedules which divided the Kroger's stores into two groups.

sell more local products; generally have a lower pricing structure; do not use the Kroger label on certain products, but have the IGA label on certain products; sell a smaller variety of precut meat products, thus requiring more cutting in the store; do not use trading stamps as did Kroger; remain open 7 days a week for longer hours, compared to 6 days under Kroger; obtain some of their merchandise from suppliers other than those previously used by Kroger, whereas Kroger had its own meat plant and bakery, and manufactured some of its own grocery products, all of which were supplied to its stores in the area."

The certification status of the unions is lost in ancient history. There is nothing in the record to indicate that any employee of either store presently desired the particular union representation. The employees were members of the union but they had to be under the union shop provisions of the master contract. Both Zim's and Paul's hired employees from no greater than one-eleventh of the Retail Clerks Union unit, *i.e.*, roughly 9% or less of the predecessor's employees in the eleven-store unit. Zim's hired meat cutters from only one-fifth of the Meat Cutters Union unit. I fail to see any basis for the existence of a continuing presumption of majority status after such a material fragmentation of the bargaining units.

The majority opinion cites pertinent authority, which I believe should be controlling here, for the proposition that a change in the size and operational methods of the employer has relevance. Included among these cases is *NLRB* v. *Alamo White Truck Service, Inc.*, 273 F.2d 238 (5th Cir. 1959). The majority opinion, however, then states that the changes relied on are similar to those found insufficient to defeat successorship in *NLRB* v. *Zayre Corp.*, 424 F.2d 1159 (5th Cir. 1970), and *NLRB* v. *Interstate 65 Corp.*, 453 F.2d 269 (6th Cir. 1971).

I find little support in these cases for the extension of the successorship rule accomplished in the majority opinion. In *Interstate* there were changes but the acquisition was of a motel which constituted a single bargaining unit. In that case the following principle of law is enunciated which I think should be dispositive of the present case:

> "If respondent's 'succession' brought with it a change in the 'essential nature of the [employing] enterprise,' then respondent had no duty to bargain. Tom-A-Hawk Transit, Inc. v. N.L.R.B., 419 F.2d 1025, 1027 (7th Cir. 1969)." 453 F.2d at 272.

In *Zayre,* the claimed successor relied upon *Alamo White, supra.* The Fifth Circuit found the reliance misplaced and made the following observation particularly pertinent to the present case.

> "It is true that in *Alamo White* this Court held that *a change from a large national employer to a small local one prevented the small transferee from being bound as a successor* by the prior bargaining obligations of the transferor. We do not believe, however, that *Alamo White* compels a rejection of the Board's conclusion here.
>
> To begin with the *change* in *Alamo White was from a large national organization to a small business with direct owner participation.* The total number of employees was reduced—only eight of the previously employed 12 mechanics were re-employed—and with the discontinuation of the parts department, a substantial portion of the prior operation was eliminated. Here there was only a change in the type of internal organization. *Both Masters and Zayre were large national companies.* Moreover, the number of employees and the basic size of the operation stayed the same." 424 F.2d at 1163. (Footnotes eliminated and emphasis added.)

Of course, there were other differences. There usually are factual differences in cases. However, it appears to me that *Alamo White,* in its basic large-to-small situation, presents a more significant parallel guideline than does the *Zayre* large-to-large transfer.

In sum, I think the new owners in the situation here involved took free and clear of any duty to bargain based upon a successorship premise. If the employees did desire union representation the matter could have been very easily determined by a resort to election procedures rather than by reliance upon a doubtful presumption which cannot be factually supported on this record.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ZIM's FOODLINER, INC., d/b/a ZIM'S IGA FOODLINER AND S & O, INC., d/b/a PAUL'S IGA FOODLINER,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 73-1199

Judgment

Before: HASTINGS, Senior Circuit Judge, PELL and SPRECHER, Circuit Judges

THIS CAUSE came on to be heard upon the petition to review, and on a cross-application for enforcement of, an order of the National Labor Relations Board dated February 16, 1973, against Zim's Foodliner, Inc., d/b/a Zim's IGA Foodliner and S & O, Inc., d/b/a Paul's IGA Foodliner, their officers, agents, successors and assigns. The Court heard argument of respective counsel on January 16, 1974, and has considered the briefs and transcript of record filed in this cause. On April 4, 1974, the Court being fully advised in the premises, handed down its opinion denying the petition to review and granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is order and adjudged by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Zim's Foodliner, Inc., d/b/a Zim's IGA Foodliner and S & O, Inc., d/b/a Paul's IGA Foodliner, their officers, agents, successors, and assigns, abide by and perform the directions of the Board in said Order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Petitioners.

/s/ JOHN S. HASTINGS
Judge, United States Court of Appeals for the Seventh Circuit

Judge, United States Court of Appeals for the Seventh Circuit

Judge, United States Court of Appeals for the Seventh Circuit

A True Copy:
Teste:

THOMAS F. STRUBBE
Clerk of the United States Court of Appeals for the Seventh Circuit.

by MARYBAR CEATEY,
Deputy Clerk.

Judge Pell dissents for reasons stated in the published opinion.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

May 14, 1974

Before

Hon. JOHN S. HASTINGS, Sr. Circuit Judge

ZIM's FOODLINER, INC., d/b/a ZIM's IGA FOODLINER, et al., *Petitioners,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	Petition for Review of an Order of the National Labor Relations Board.

No. 73-1199

This matter comes before the Court on the motion of Petitioners to stay the Court's mandate for a period of thirty (30) days pending Petitioners' application to the United States Supreme Court for writ of certiorari. On consideration whereof;

IT IS ORDERED that the mandate of this Court be stayed to and including June 13, 1974.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1863

ZIM'S FOODLINER, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-59) is reported at 495 F. 2d 1131. The Board's decision and order (Pet. App. 1-31) are reported at 201 NLRB No. 141.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1974 (Pet. App. 60-61). The petition for a writ of certiorari was filed on June 12, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Zim's and S&O were required to recognize and bargain with the unions recognized by the predecessor-employer, Kroger.

2. Whether Zim's violated its duty to bargain with the unions representing its employees when it unilaterally reduced wage rates and working hours.

3. Whether Zim's unlawfully warned employees that it would go out of business if they continued to be represented by a union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.),* are set forth at Pet. 3-4.

STATEMENT

For several years prior to July 1971,[1] the Kroger Co. owned 57 supermarkets in the State of Wisconsin, including those at Monroe and Edgerton (Pet. App. 33). Grocery employees at Kroger's Monroe and Edgerton stores were represented by the Retail Clerks, and meat and delicatessen employees at Monroe were represented by the Meat Cutters[2] (Pet. App. 34-35). The collective bargaining agreements with both unions covered other Kroger stores as well,[3] and both contained union

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[1]All dates are in 1971 unless otherwise indicated.

[2]Retail Clerks Union Local No. 1401, and Amalgamated Meat Cutters & Butchers Workmen of North America, Local No. 444, respectively.

[3]The Retail Clerks agreement covered eleven Kroger stores, and the Meat Cutters agreement covered five Kroger stores (Pet. App. 35).

security clauses (Pet. App. 35). However, the agreements dealt with each store separately, setting different wages rates for different stores (Pet. App. 16). Moreover, although Kroger made promotional, merchandising, and layout decisions, personnel matters—such as hiring, discharge, and discipline—were handled at the store level subject to final approval by Kroger's personnel office (Pet. App. 13-14).

On July 19, Kroger executed purchase agreements with petitioners Zim's and S&O whereby Zim's would acquire the Monroe store and S&O would acquire the Edgerton store (Pet. App. 33). Zim's owner, Lowell Zimmer, had previously managed other Kroger stores (Pet. App. 10-11). Upon purchasing the Monroe store he hired all of Kroger's employees and retained the Kroger store manager in the same position with similar responsibilities (Pet. App. 35). S&O's principal owner, Paul Sanderson, had also managed another Kroger store (Pet. App. 11). In addition to his wife, son, and daughter, Sanderson hired nine of Kroger's fourteen employees and also retained the Kroger store manager (Pet. App. 35-36).

Kroger ceased all operations at both stores on July 24; Zim's and S&O opened on July 27 (Pet. App. 35). Kroger job titles were eliminated, but employees continued performing essentially the same job functions. Both stores continued Kroger's grocery, meat, and produce departmental structure, offering the same types of products to generally the same customers. The basic supermarket operation—stocking merchandise, self-service, checkout counter bagging, and payment—remained unchanged (Pet. App. 12, 47-48).

Timely union requests for recognition were refused by both Zim's and S&O (Pet. App. 36). Beginning in mid-August, Zim's unilaterally reduced employee wages and

working hours (Pet. App. 37). On three separate occasions, Zim's owner warned employees that he would close the store if a union came in (Pet. App. 39).

The Board found that Zim's and S&O were successor-employers to Kroger and hence bound by its bargaining obligation to the unions. That the purchasers succeeded to portions of Kroger's bargaining unit and exercised more localized control of supermarket operations did not, in the Board's view, require a contrary conclusion, in view of the admitted appropriateness of single store units, the separate store identities reflected in past bargaining agreements, the retention of the Kroger employees at each store, and the absence of significant changes in store operations following the transfers (Pet. App. 15-19).

Accordingly, the Board held that the refusals to bargain and Zim's unilateral reductions in wages violated Sections 8(a)(1) and (5) of the Act. The Board also held that Zim's store closure threats violated Section 8(a)(1) (Pet. App. 19-21). Zim's and S&O were ordered to bargain with the unions and Zim's was ordered to make whole its employees for losses caused by the unilateral reductions (Pet. App. 22). The court of appeals (one judge dissenting) affirmed the Board's findings and conclusions and enforced its order (Pet. App. 32-59).

ARGUMENT

1. As petitioners acknowledge (Pet. 9), the question whether the purchaser of a business must recognize and bargain with the union which represented the predecessor's employees turns on whether the " 'employing industry' retained its identity and continuity to a degree sufficient to make it reasonable that the purchaser-employer be re-

quired to recognize and bargain with an incumbent union." See *National Labor Relations Board* v. *Burns Int'l Security Services*, 406 U.S. 272, 279-281; *National Labor Relations Board* v. *Interstate 65 Corp.*, 453 F. 2d 269, 273 (C.A. 6). Accordingly, the basic question is whether the court below properly concluded that such identity and continuity was preserved here. This issue turns on an evaluation of the particular facts of this case and thus does not warrant review by this Court. In any event, the court's conclusion is reasonable in view of the facts that the separate identity of each store had been preserved in Kroger's collective bargaining agreements; the new owners retained virtually all of Kroger's employees,[4] who continued to perform the same job functions, under the same immediate supervision and other working conditions; and the new owners continued to serve Kroger's former customers at the same locations, utilizing the same facilities.

National Labor Relations Board v. *Alamo White Truck Service, Inc.*, 273 F. 2d 238 (C.A. 5), and *Int'l Assoc. of Machinists, District Lodge 94* v. *National Labor Relations Board*, 414 F. 2d 1135 (C.A. D.C.), certiorari denied, 396 U.S. 889, relied on by petitioners (Pet. 9-11), are not inconsistent with the above analysis. In *National Labor Relations Board* v. *Zayre Corp.*, 424 F. 2d 1159, 1163-1164 (C.A. 5), the court noted that its holding in *Alamo* rested not solely upon the change from national to local control, but also upon a reduction in work force, contraction of operations,

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[4]Although in *Burns*, *supra*, the union's representative status was based on a Board certification, contrary to petitioners' contention (Pet. 10-11), a presumption of continuing majority status is equally valid where, as here, there was an established bargaining history following voluntary recognition. *National Labor Relations Board* v. *Frick Co.*, 423 F. 2d 1327, 1332 (C.A. 3).

and retention of only non-union predecessor employees. Similarly in *District Lodge 94, supra*, 414 F. 2d at 1138, the court emphasized that a "substantial non-discriminatory change in personnel" contributed to its finding of lack of successorship. By contrast, in the present case neither business operations nor employee complement were affected by the ownership transfers. The Board's finding that the bargaining obligation continued in these circumstances, notwithstanding the change to a local operation, accords with prior precedents. See *Interstate 65 Corp., supra*, 453 F. 2d at 272-273; *Ranch-Way, Inc.* v. *National Labor Relations Board*, 445 F. 2d 625, 627 (C.A. 10), remanded on other grounds, 406 U.S. 940; *Quaker Tool & Die, Inc.*, 162 NLRB 1307, 1311, enforced, 403 F. 2d 1021 (C.A. 6).

2. While a new employer may set its initial terms of employment, it may not, after its duty to honor the predecessor's bargaining obligation has attached, unilaterally change conditions of employment. *Burns, supra*, 406 U.S. at 295; *National Labor Relations Board* v. *Bachrodt Chevrolet Co.*, 468 F. 2d 963, 969-970 (C.A. 7), remanded on other grounds, 411 U.S. 912; *Overnite Transportation Co.* v. *National Labor Relations Board*, 372 F. 2d 765, 768-769 (C. A. 4). Petitioners challenge (Pet. 12-13) the Board's finding, approved by the court below, that Zim's bargaining obligation had already been established when it unilaterally reduced wages and hours several weeks after reopening. Such a determination likewise turns on the facts of this particular case and thus does not warrant further review.

In any event, the record supports the Board's conclusion. Thus, Kroger's employees were instructed to report to work for Zim's on July 27 "as if nothing had happened" (A. 85).[5] For a period of three weeks thereafter, Zim's

[5] "A." references are to the appendix to the briefs in the court below.

continued in effect the terms and conditions of employment set out in Kroger's collective bargaining agreements; it then made changes without consulting the unions (Pet. App. 52). Unlike *National Labor Relations Board* v. *Wayne Convalescent Center, Inc.*, 465 F. 2d 1039 (C.A. 6),[6] relied on by petitioners, the unilateral wage and hour reductions occurred well after Zim's had decided to continue its predecessor's retail grocery operations with the same complement of employees, and there was no suggestion that such changes were previously contemplated.

3. Petitioners contend (Pet. 13) that the "predictions" by Zim's owner that he would close the store in the event of unionization were lawful because they were not made during an active organizational campaign. The statements were made, however, at a time when Zim's was refusing requests to bargain and taking unilateral action in violation of the Act. In these circumstances, the Board was warranted in finding that they were coercive, particularly since Zim's had shown no "basis of objective fact" for its predictions. *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 618.

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[6]In *Wayne*, the court found that "[i]t was not 'perfectly clear' at the time of the unilateral changes * * * that the employer was going to retain all of the predecessor's employees. There was substantial testimony * * * that * * * the new owners were going to * * * convert the premises to a 'bed and board' facility. If this occurred Wayne would need to retain but a few of Clark's employees." 465 F. 2d at 1042-1043, n. 6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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